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Privacy, Property, and Free Speech: Law and the Constitution in the 21st Century

Course Guidebook

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Professor Rosen graduated summa cum laude from Harvard College and was a Marshall Scholar at the University of Oxford. After graduating from Yale Law School, he clerked for Chief Judge Abner Mikva on the U.S. Court of Appeals for the D.C. Circuit. Professor Rosen's essays and commentaries have appeared in *The New York Times Magazine*; in *The Atlantic*; on National Public Radio; and in *The New Yorker*, where he has been a staff writer. The *Chicago Tribune* named him one of the 10 best magazine journalists in America, and the *Los Angeles Times* called him "the nation's most widely read and influential legal commentator." ■

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Privacy, Property, and Free Speech: Law and the Constitution in the 21st Century

Scope:

At the beginning of the 21st century, breathtaking changes in technology are posing stark challenges to our constitutional values in democracies around the world. From free speech to privacy, from liberty and personal autonomy to the right against self-incrimination, basic constitutional principles are under stress from technological advances unimaginable even a few decades ago—let alone in the founding era.

The law has always struggled with the complexities of life, but as the pace of change in modern society quickens with each invention and scientific discovery, that struggle is becoming more daunting by the day. You don't need to be a lawyer to feel the urgency of the challenges that confront us. The following are some of the questions that this course will confront.

- How can we protect free speech in a world in which most speech is online, a world in which Google and Facebook have more power over free speech and privacy than any king, president, or Supreme Court justice?

- Should the government be free to track our movements in public by monitoring the global positioning system devices on our cell phones?

- What rights should we have to control our identities on the Internet?

- Should couples be free to use genetic engineering to design their babies?

- Does the Constitution restrict the government's ability to look within our brain?

- Should the Constitution place restrictions on governmental power to investigate people's DNA?

- Is the Internet solely responsible for an explosion of democratic participation, or is it also undermining checks on democracy that are necessary for individual rights to flourish?

Issues like these affect all of us, and that's why they're so fascinating. They test the limits of constitutional principles that date back to the founding of the United States: the right of free speech, the privilege against self-incrimination, the safeguards against unreasonable search and seizure, and the very definition of personhood. The Constitution was written well before many of today's dilemmas arose. How should we address them in a way that preserves the freedoms and the way of life that our Constitution has protected for so long?

This course dives into these cutting-edge issues—from aerial drones to WikiLeaks and beyond. It examines the evolution of our rights of privacy, property, and free speech from the 18th-century founding era to today, including rights of privacy at home, on the street, in the courtroom and police station, and in computers and cell phones. This course also considers rights of reproductive choice and sexual intimacy, the right to die, the right to bear arms, the right not to have private property taken without just compensation, rights of economic liberty and health care, and the right to be forgotten on the Internet. This course closely examines the constitutional history and philosophy underlying our rights and consider how to guard those rights in light of today's challenges—and who is in the best position to do so. This course also explores some of the ways that you can protect yourself against the kinds of risks that are an inescapable part of our digital, interconnected era.

There is no question that democracies around the world will change in response to developing technology—as they have always changed in the past. However, it is far from clear how that change will take place, what form it will take, and how effective it will be. This course identifies the range of options that judges, technologists, legislators, and citizens have as they struggle to respond to technological shifts. Combining practical advice with discussion of constitutional history and cutting-edge technology, this course offers an analytical blueprint for translating democratic values into the 21st century. ■

Freedom and Technological Change

Lecture 1

Judges, regulators, legislators, technologists, and politically engaged citizens have been contemplating the future of the Constitution for years, but there has never been a more urgent and exciting time to think about how the protections for privacy, property, and free speech envisioned by the American founders are being challenged by dizzying new technologies. There are no simple answers to the challenging constitutional issues that will be examined in this course, but only by educating yourself about the relevant laws and technologies can you develop an informed opinion about where to draw hard lines.

Plausible Supreme Court Scenarios

- Suppose, in response to popular demand, that Facebook decides to post live feeds from public and private surveillance cameras and drones so that they can be searched online. With facial recognition technology, a user can click on an image of a stranger, plug the image into a Facebook or Google database to identify him or her by name, and then follow his or her movements from place to place.

- Imagine that this ubiquitous surveillance is challenged as a violation of the Fourth Amendment, which prohibits unreasonable searches and seizures of our "persons, houses, papers, and effects." Under existing doctrine, the Fourth Amendment may not be construed to regulate Facebook, which is a corporation—not the government. Even if there were enough state action to trigger the Constitution, the Supreme Court has come close to saying that we have no expectations of privacy in public places.

- As genetic selection becomes more advanced, couples that use in vitro fertilization are increasingly selecting embryos on the basis of sex, height, sexual orientation, and even intelligence. In response to concerns about the new eugenics, several states enact laws banning genetic screening for nontherapeutic purposes. These

laws are then challenged before the Supreme Court as a violation of the personal liberty and autonomy protected by the due process clause of the Constitution. Existing case law, however, offers little guidance about whether the right to have offspring, recognized in cases such as *Roe v. Wade*, includes an unlimited right to select the characteristics of those offspring.

- As brain scans become increasingly sophisticated, they are becoming de rigueur in death penalty trials, where defense lawyers routinely seek to introduce functional magnetic resonance imaging (fMRI) scans to prove that their clients were unable to control their violent impulses. Under the relaxed evidentiary standards for capital sentencing, this evidence is usually admitted, and lawyers predict that "neurolaw" evidence will increasingly transform the legal system, calling into question traditional ideas of moral responsibility.

- Some scholars already claim that neuroscience should lead the legal system to jettison retribution as a goal of criminal punishment because it's unfair to hold people responsible for actions that are predetermined by their brains rather than chosen by their free will. Alternatively, imagine that in the future, brain scans can predictably identify people with dangerous propensities to violence and imagine that a state predicates a civil commitment on the results of scans.

The Constitution in the 21st Century

- The paradigmatic cases that animated the framers of the Constitution to protect our rights of privacy, property, and free speech in the 18th century no longer provide clear guidance in the 21st century.

- Consider the Fourth Amendment, which says, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." When the framers of the U.S. Constitution prohibited "unreasonable searches and seizures" of our "persons, houses, papers, and effects" in 1791, they were thinking about the search of one person's house in particular—that of the British rabble-rouser John Wilkes.

- In 1763, Wilkes's suit against King George's minions for breaking into his London house and rifling through his private papers inspired the framers of the Fourth Amendment to the Constitution to insist that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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Basic constitutional principles are under stress from technological advances that were unimaginable in the founding era.

- How much protection does the warrant requirement provide in an age when our private papers are stored not in desk drawers locked in our houses but in the digital cloud—that is, distributed servers owned by Google and Yahoo!—and the government can seize them without any physical trespass at all?

- Consider the Fifth Amendment, which says, "No person … shall be compelled in any criminal case to be a witness against himself." In declaring that people can't be forced to testify against themselves, the framers of the Constitution once again had a particular case in mind: that of John Lilburne, a British puritan who was investigated in 1638 by the Star Chamber for heresy—namely, refusing to accept the authority of the Church of England.

- The Star Chamber was notorious because it forced suspected religious dissenters to take the oath ex officio, which required a witness to promise that he or she would truthfully answer all questions that were put to him or her without knowing in advance

what the court would ask. Lilburne refused to take the oath ex officio and, as a result, was flogged and fined.

- The ordeal of Lilburne was cited in *Miranda v. Arizona* (1966), which held that suspects must be informed, during interrogations, of their right to remain silent. Lilburne's struggles provide far less protection for privacy in an age when brain scan technologies mean it's possible to read suspects' minds—and to determine their propensities to violence—without putting them under oath.

- Consider the First Amendment, which says, "Congress shall make no law … abridging the freedom of speech." When the First Amendment was ratified, the framers had one free speech hero in mind: John Peter Zenger, who was a printer of *The New-York Weekly Journal*, which published articles criticizing the royal governor of New York for replacing the Chief Justice of New York after he ruled against the governor in a case. In 1735, Zenger was tried for seditious libel. Ultimately, the jurors at Zenger's trial refused to convict him of sedition—an early example of jury nullification, or the refusal of jurors to convict guilty defendants of violating laws that the jurors believed were unjust.

- The *Zenger* case came to stand for the principle that true statements couldn't be criminalized by the government. The case of *Zenger* is an inspiring example of 18th-century liberty in action, but what can it teach us in an age when the people with the most power over who can speak and who can be heard aren't royal governors but lawyers at Facebook and Google, who aren't constrained by the First Amendment?

Chief Justice Taft versus Justice Brandeis

- The Supreme Court's first encounter with electronic surveillance was a case decided in 1928 called *Olmstead v. United States*, which arose when the federal government began to tap phones in an effort to enforce Prohibition. Olmstead was the general manager of an enterprise that produced two million dollars a year by shipping and selling illegal liquor between Seattle and British Columbia. Federal

agents put wiretaps on the phone lines near Olmstead's home and office and testified about the conversations they overheard at his subsequent trial. Olmstead claimed that the wiretaps violated the Fourth Amendment.

- In a literal-minded opinion, Chief Justice William Howard Taft disagreed with Olmstead. The Fourth Amendment, he said, was originally understood to forbid only searches or seizures accompanied by physical trespass. The agents had not trespassed on Olmstead's property when they placed wiretaps on the phone lines in the streets near his house. Moreover, the conversations that the agents overheard were not material things, like papers or other personal property, and therefore were not protected by the Fourth Amendment.

- In a visionary dissenting opinion, Justice Louis Brandeis grappled with the issue of adapting 18th-century values for a 20th-century world. When the Constitution was adopted, Brandeis noted, breaking and entering into the home was the only way for the government to invade a citizen's private thoughts, but in the 1920s, subtler ways of invading privacy, such as wiretapping, had become available to the government. To protect the same amount of privacy that the framers of the Fourth and Fifth Amendments intended to protect, Brandeis argued, it was necessary to extend those amendments to prohibit the warrantless searches and seizures of conversations over wires.

- Brandeis was sufficiently prescient to look forward to the age of cyberspace and to predict that technologies of surveillance were likely to progress far beyond wiretapping. In anticipation of those future innovations, Brandeis challenged his colleagues to translate the Constitution once again to take account of the new technologies—or else risk protecting less privacy and freedom in the 21st century than the framers of the Constitution expected in the 18th century.

Translating the Constitution

- Some justices who call themselves originalists, such as Justice Clarence Thomas, believe that the Constitution should be interpreted in light of the original understanding of its framers or ratifiers and shouldn't evolve unless it's amended. Other justices, such as Justice Brandeis, believe that it's important to interpret the Constitution so that it protects at least as much privacy in the 21st century as the framers of the 18th-century Constitution took for granted.

- Because the framers couldn't have anticipated technologies like video games or global positioning system (GPS) devices, as Justice Samuel Alito has pointed out, a justice who believes in constitutional translation needs to define constitutional values broadly enough to capture the general principles the framers meant to protect—not the specific applications of those principles they anticipated in the 18th century.

- The technologies that Brandeis imagined have now come to pass, and they affect a broad range of constitutional values—not just privacy. At the same time, these new technologies are having an impact on vastly greater numbers of people than Brandeis could have imagined possible.

- Sometimes, it's judges who take up Brandeis's challenge to translate legal and constitutional doctrines in light of new technologies, but the task of translating constitutional values has never been left exclusively to judges.

- Sometimes, Congress has kept constitutional values current with legislation. The hard work of applying the Fourth Amendment to wiretapping was ultimately done not by judges, but by the U.S. Congress, which in 1968 passed the federal wiretapping law and, a decade later, passed the Foreign Intelligence Surveillance Act.

- Sometimes, regulatory agencies have taken the lead, such as the Federal Communication Commission's endorsement of a principle called network neutrality, which says that service providers must

treat all data equally and may not block or delay any content or applications.

- Repeatedly, the courts and Congress have adapted the meaning of the Constitution only after political activism leads to a transformation in the way the American people perceive their rights. For example, after travelers' protests, airport body scanning machines that displayed graphic images of the naked body were exchanged for a machine that scrambles the naked images of the people that walk through them.

- Sometimes, Supreme Court decisions can hijack a more gradual process of social change and local legislation to create a backlash of public feeling. For example, *Roe v. Wade*, which recognized a broad right to choose abortion in 1973, jumped ahead of the political movement that was persuading state legislatures to liberalize their abortion laws, creating a political backlash that continues to inflame the national debate about abortion.

- The most hotly contested battle between privacy and free speech on the Internet today is over a new right proposed by the European Union: the right to be forgotten, or *le droit à l'oubli* ("the right of oblivion")—a right that allows a convicted criminal who has served his or her time and has been rehabilitated to object to the publication of the facts of his or her conviction and incarceration.

- The right is a response to a growing problem: the difficulty of escaping your past on the Internet. Unless the right is defined more precisely when it is promulgated, the proposed European right to be forgotten could precipitate a dramatic clash between European and American conceptions of the proper balance between privacy and free speech, leading to a far less open Internet.

Suggested Reading

Cash, *John Wilkes*.

Urofsky, *Louis D. Brandeis*.

Zetter, "TSA Investigating 'Don't Touch My Junk' Passenger."

Questions to Consider

1. How would you feel if the government used the Open Planet system to follow your movements 24-7 on Google or Facebook? What if your neighbors tracked you 24-7? Would your behavior change? What's the harm of ubiquitous surveillance, if any?

2. How do you feel about brain scans that can predict people's future behavior and proclivities? Is it fair to lock up suspects for what they think rather than what they've done—for their predicted future crimes rather than their past crimes?

Privacy and Virtual Surveillance

Lecture 2

In this lecture, you will examine several areas where new technologies are challenging our existing ideas about constitutional protections for privacy in public places. Part of the problem is that the Fourth Amendment binds the government—not companies like Facebook and Google that determine the scope of privacy today. In addition, the Fourth Amendment was intended to protect our privacy in the home against physical trespass, but now our movements can be ubiquitously tracked in public without trespassing on our property rights in the home.

A Hypothetical Privacy Challenge

- It's easy to imagine that popular demand for live surveillance camera feeds may soon be joined by arguments from the U.S. government that an open-circuit television network would be invaluable in tracking potential terrorists. As a result, imagine that Facebook decides to link public and private camera networks, post them live online, and store the video feeds without restrictions on distributed servers in the digital cloud.

- Because cameras are increasingly ubiquitous in public and commercial spaces, the result would be the possibility of identification and surveillance of all citizens virtually anywhere in the world—and by anyone. Imagine that Mark Zuckerberg, as CEO of Facebook, names the new around-the-clock surveillance system Open Planet.

- Open Planet is not a technological fantasy; most of the architecture for implementing it already exists. In fact, it's possible, using existing technology, to reconstruct someone's movements 24-7—from E-Z pass records to the locational information emitted from cell phones, which are the equivalent of personal tracking devices. Face recognition is already being used to tag Facebook photos, and storage capacity is increasing exponentially. The only limitations

are the coverage and scope of existing cameras, which are broadening by the day.

- If Open Planet went live, would it violate the Constitution? Under current Supreme Court doctrine, it might not—at least not if it were a purely private affair run by private companies alone and without government involvement. Both the First Amendment, which protects free speech, and the Fourth Amendment, which prohibits unreasonable searches and seizures, restrict only government actions.

- On the other hand, if the government directed the construction of Open Planet or used the system to track citizens or suspected terrorists on government-owned, as well as private sector, cameras, perhaps Facebook might be viewed as the equivalent of a government actor and, therefore, would be restricted by the Constitution. However, even in that case, a series of other doctrines might bar judicial intervention. In fact, the Court has said that we have no expectations of privacy in data that we voluntarily surrender to third parties.

- We seem to have less protection against surveillance in the 21st century than Americans did in the 18th century, at which time a far less intrusive invasion of privacy—namely, the warrantless search of private homes and desk drawers for seditious papers—was considered the paradigmatic case of an unreasonable and unconstitutional invasion of privacy.

The Evolution of the Fourth Amendment

- Invasive searches—like 24-7 surveillance on Facebook or naked machines at airports—aren't considered clear violations of the Fourth Amendment. To understand how the Fourth Amendment evaporated in an electronic age, you need to understand more about its evolution from its historical roots.

- When the framers of the U.S. Constitution prohibited "unreasonable searches and seizures" of our "persons, houses, papers, and effects" in 1791, they were thinking about the search of one person's house

in particular: that of John Wilkes, who not only sued the King's messengers for trespassing on his property, but he also urged a number of other publishers and printers who had been arrested under general warrants to do the same.

- For most of the 19th century, the privacy of private papers remained sacrosanct in America. In 1890, in the most famous article on the right to privacy ever written, Louis Brandeis, the future Supreme Court justice, wrote confidently that not only the contents of private letters, but even a general description of their contents, should be immune from publication.

- How, then, do we find ourselves in a world in which employers and universities can search their employees' e-mail and monitor their reading habits on the Internet? Part of the answer has to do with the Supreme Court's response to the growth of new technologies of monitoring and surveillance, which has proven to be distressingly passive at every turn.

The Supreme Court's Response to New Technology

- The Supreme Court's first encounter with electronic surveillance was with the 1928 case *Olmstead v. United States*. In a wooden opinion by Chief Justice Taft, a majority of the Court held no trespass, no constitutional violation. In his visionary dissenting opinion, Justice Louis Brandeis insisted that the Constitution had to protect just as much privacy in the age of the wires as it did during the colonial era—regardless of whether a physical trespass was involved.

- A few decades later, in 1967, the Supreme Court appeared to accept Brandeis's argument that technologically enhanced eavesdropping could qualify as an unreasonable search, but it did so in a way that inadvertently undermined Brandeis's central insight. In *Katz v. United States*, government agents attached a listening device to a public telephone booth and recorded a gambling suspect's end of the conversation without his knowledge.

- Overruling the *Olmstead* decision, which had held that there could be no search or seizure without a "physical intrusion," the Court announced that the "Fourth Amendment protects people, not places." Because Mr. Katz, the suspected gambler, had taken steps to preserve his privacy by closing the door of the phone booth behind him, the Court held that he reasonably expected that his conversations wouldn't be monitored without a judicial warrant.

- In an influential concurring opinion, Justice John Harlan proposed the following test for determining what kind of surveillance activity should trigger the protections of the Fourth Amendment: A person must have an actual or subjective expectation of privacy, Harlan suggested, and the expectation must be one that society is prepared to accept as reasonable.

The Supreme Court's response to the growth of new technologies of monitoring and surveillance has proven to be distressingly passive.

- Harlan's test was applauded as a victory for privacy, but it soon became clear that it was entirely circular. People's subjective expectations of privacy tend to reflect the amount of privacy they subjectively experience, and as advances in the technology of monitoring and searching have made increasingly intrusive surveillance possible, expectations of privacy have naturally diminished with a corresponding reduction in constitutional protections.

- In a series of related rulings, the Court held that if you share information with someone else, you relinquish all "reasonable expectation of privacy" that the information will remain confidential. As a result of these doctrines, the Court has come close to saying that we have no legitimate expectations of privacy in public places—at least when the surveillance technologies in question are in general public use by ordinary members of the public.

- There remains an enclave of privacy against electronic surveillance in the home. In a 2001 case, *Kyllo v. United States*, the police suspected a gentleman named Kyllo of growing marijuana in his home. They used a thermal imaging device to scan the walls of his apartment to measure the heat emanating from the walls.

- The scan showed that Mr. Kyllo's garage roof and a sidewall were relatively hot compared to the rest of his home and much warmer than the neighboring units. Based in part on the thermal imaging, a federal magistrate issued a warrant to search Kyllo's home. There, the agents found marijuana growing under a heat lamp that had warmed up the walls, just as they suspected. Kyllo sued, on the grounds that his home had been unreasonably searched. He said the police should have obtained a warrant before using the thermal imaging devices. In a surprising five-to-four opinion written by Justice Scalia, the Supreme Court agreed.

- The *Kyllo* decision seemed like a great victory for privacy, but it, too, might be considered pyrrhic. Only technology not in general public use is constrained by the Constitution; as invasive

technologies become more pervasive, the constitutional limitations evaporate. Moreover, the decision only restricts technologies that can peer into the home. When it comes to surveillance of our movements in public places, some courts have said that we have no protection whatsoever.

- In a 1983 opinion upholding searches by drug-sniffing dogs, Justice Sandra Day O'Connor recognized that a search is most likely to be considered constitutionally reasonable if it is very effective at discovering contraband without revealing innocent but embarrassing information. The naked millimeter wave machines that have provoked controversy in American airports seem, in O'Connor's view, to be the antithesis of a reasonable search: They reveal a great deal of innocent but embarrassing information and are remarkably ineffective at revealing low-density contraband.

- On the other hand, the Court has also held that the government gets great deference in airports and at the border, where routine border searches don't require special justification. If the naked machines are considered routine searches—unlike real strip searches—then the Court might uphold them.

- In *United States v. Jones* (2012), the most important privacy case of the decade, police officers put a GPS device on a suspect's car and then used it to track the position of the car every 10 seconds for a month without obtaining a valid search warrant. Three lower federal courts held that the use of a GPS tracking device to monitor someone's movements in a car over a prolonged period is not a search because we have no expectations of privacy in our public movements.

- The U.S. Supreme Court, in a landmark opinion by Justice Antonin Scalia, rejected the claim, holding that the police trespassed on the suspect's property rights when they attached a GPS device to his car without his consent. Writing for five members of the Court, Scalia held that because the framers of the Constitution believed that any physical trespass was a search, the fact that the police in

this case trespassed on the suspect's property rights in his car made this a search as well. Scalia's opinion was an important reminder that the law of trespass should provide a floor, if not a ceiling, for evaluating privacy claims today.

- However, the majority's reasoning provided no protection from virtual surveillance that doesn't involve a physical trespass. After all, the police could have obtained the same information about the suspect's movements by subpoenaing the records of the low-jack GPS device embedded in his car. As Justice Samuel Alito pointed out in his concurring opinion, Scalia's focus on physical trespass would leave much virtual surveillance unregulated. The availability and use of cell phones and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

- Alito proposed a different test for measuring whether virtual surveillance technologies rise to the level of being a search: Brief surveillance should be permissible without a warrant, but long-term surveillance should not be permissible without a warrant. Although he was unable to identify the precise moment when brief surveillance became long-term surveillance, Alito said that if the police are unsure, they should get a warrant.

Possible Responses to Ubiquitous Internet Surveillance

- Using Justice Alito's opinion about the GPS devices as a model, the Supreme Court might hold that because prolonged surveillance on the Internet potentially reveals far more about each of us than 24-7 GPS tracking does, it therefore should be struck down as an unreasonable search of our persons. However, the Court could also hold that if citizens were aware that their movements in public were being broadcasted on the Internet, their expectations of privacy were diminished and they have no constitutional protections. That's the problem with the circular expectations-of-privacy test.

- If it were casting about for alternatives, the Supreme Court might also choose to strike down ubiquitous surveillance on more

expansive grounds, relying not just on the Fourth Amendment, but also on the right to personal autonomy recognized in cases like *Roe v. Wade*. These right-to-privacy cases are often viewed as cases about sexual autonomy, but in reaffirming *Roe v. Wade* in 1992, Justice Anthony Kennedy recognized a far more sweeping principle of personal autonomy that might well protect individuals from totalizing forms of ubiquitous surveillance.

- Just as citizens in the Soviet Union were inhibited by ubiquitous KGB surveillance, Kennedy might hold, the possibility of ubiquitous surveillance also violates the right to autonomy. Nevertheless, the fact that the system is administered by Facebook, rather than the government, might be an obstacle to a constitutional ruling along these lines.

Suggested Reading

Rosen, *The Naked Crowd.*

Slobogin, *Privacy at Risk*.

Swire, "A Reasonableness Approach to Searches."

Questions to Consider

1. What do you think about license plate readers that can track the movements of your car? If the police tracked your movements for a month, do you think that would violate the Constitution? What would the Supreme Court say, based on the various opinions in *United States v. Jones*?

2. Discuss *United States v. Jones*, the GPS tracking case. Are you more concerned about the fact that the police physically attached a device to the suspect's car, like Justice Scalia, or about the amount of information that geolocational tracking can reveal, like Justice Alito? Do you think we should have any constitutionally protected expectations of privacy in our public movements?

Privacy at Home

Lecture 3

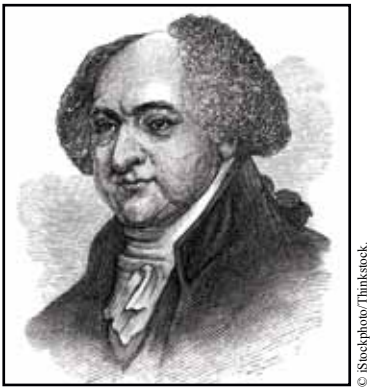
In this lecture, you will explore the reasons that constitutional protections for private papers and diaries in the home have evaporated during the past few decades. You will learn that although the home remains the place where we have more legally protected privacy than anywhere else, that special status means less in an age when our most private "papers and effects" are stored not in locked desk drawers in the home, but in the third-party computer servers owned by Google, Yahoo!, and other private companies that make up the digital cloud.

The Evaporation of Fourth Amendment Protection

- The *Wilkes* case established the principle in English common law that the government couldn't enter the home and rifle through personal papers and private diaries without meaningful restrictions. In presiding over the trial of John Entick, another person who had his home searched under a general warrant on suspicion of seditious libel, Lord Camden, who was also the judge in the *Wilkes* case, noted that without particularized warrants that specified the place to be searched or the thing to be seized, an individual's home would never be safe.

- In the founding era, the famous writs of assistance cases also convinced the framers of the importance of constitutional protection for the home. The writs of assistance were orders issued by British courts in the Massachusetts Bay Colony in the 1760s, authorizing customs officials to search the homes of colonists for smuggled goods without having to obtain a particularized warrant. They were called writs of assistance because they called on local authorities and citizens to assist the customs officials in combating smuggling; they were hated as instruments of tyranny because they never expired—unless the King died—and they allowed houses to be searched at the whim of those who held them.

- A group of merchants in Boston hired James Otis, a prominent Boston lawyer, to argue against the writs. John Adams attended the hearing and took particular note of Otis's statement that "one of the most essential branches of English liberty is freedom of one's house. A man's house is his castle; and whilst he is quiet; he is as well guarded as a prince in his castle." Despite that argument, the court reissued the writs—a decision that Adams viewed as the beginning of the American Revolution.



John Adams (1735–1826) was the first vice president and second president of the United States.

- The Fourth Amendment protects "persons, houses, papers, and effects," and the framers of the Constitution thought of these protections as a package, suggesting that it was necessary to protect the sanctity of private papers in order to protect the sanctity of the home. That principle—that the government can't compel someone to open the doors of the home in order to inspect private papers—reached its high-water mark in a case called *Boyd v. United States*, decided in 1886.

- The *Boyd* opinion was, arguably, an odd occasion for the Court to strike a blow for the sanctity of private papers: It involved a subpoena not for personal diaries, but for a business invoice, which the government alleged would show that a Philadelphia company had imported glass without paying the necessary customs duties. However, in an expansive opinion, Justice Bradley struck down the federal statute authorizing the subpoena, quoting approvingly from Lord Camden's judgment in *Entick v. Carrington*.

- More than two centuries later, when Bob Packwood, a Republican senator from Oregon, tried to conceal his diaries (containing

"proof" that he did not engage in sexual misconduct with his former press secretary) from his fellow legislators, he found that the legal protections for private papers in the home had evaporated.

- Packwood's lawyers contested the subpoenas of the Senate Ethics Committee, citing the famous *Boyd* opinion and the story of John Wilkes. Unmoved by Packwood's citation of the *Boyd* case, Judge Thomas Penfield Jackson of the U.S. District Court in Washington ordered him to turn over his diaries to the Senate. The 19th-century right to privacy, Jackson noted in a remarkably breezy opinion, had been chipped away by subsequent Supreme Court decisions that were initially motivated by a single purpose—eradicating white-collar crime.

- In fact, the erosion of the Fourth Amendment began much earlier than Jackson acknowledged. At the end of the 19th century, in the years leading up to the Progressive era, it became clear that if people could refuse to turn over their corporate records in response to grand jury subpoenas, then it would be impossible to enforce antitrust laws or railroad laws, and the regulatory state would come to a grinding halt.

- Well before the New Deal, the Court decided that the only way to investigate corporate crime would be to give prosecutors broad power to subpoena witnesses and to produce documents. In 1948, the New Deal Court held that the Fifth Amendment wasn't violated by requiring someone to produce records that the government had ordered him or her to keep—no matter how incriminating or embarrassing the records might be.

- The real end of the privacy of private papers came in the 1960s and 1970s. The Warren and Burger Courts dramatically expanded the power of the police to conduct intrusive searches and, in the process, threatened the ability of innocent people to control the disclosure of personal information. In the 1960s, as part of an effort to constrain violent and sometimes racist police forces in the South,

the Warren Court held that evidence obtained in unconstitutional searches had to be excluded from criminal trials.

- However, the justices soon realized that they had painted themselves into a corner: If every search, no matter how trivial, had to meet elaborate constitutional standards—including a warrant issued by a magistrate who has probable cause to believe a crime had been committed—law enforcement would be impossible. The Court's hastily improvised solution was to pretend that all sorts of dramatic intrusions on privacy, such as planting bugs in people's clothing, rummaging through their trash, and spying on them with high-powered binoculars, weren't really searches or seizures in the first place. The result was a legal climate that constricted the constitutional protections for privacy at the very moment that techniques of surveillance were dramatically increasing.

- Meanwhile, even as the Court was narrowing the scope of impermissible searches, it was expanding the scope of permissible warrants and subpoenas. In the 18th and 19th centuries, when vigorous protections for private property prevailed, magistrates could not issue warrants for "mere evidence" that a crime might have been committed.

- In the 18th century, only the fruits and instrumentalities of a crime, such as contraband, could be seized—on the theory that they didn't belong to the suspect in the first place. In 1967, however, Justice William Brennan, one of the most liberal justices of his era, issued one of the most pro–law enforcement opinions in American history: He abandoned the ancient distinction between seizures of evidence and the fruits of a crime and held that government, armed with a warrant, could search a home and seize mere evidence as well as contraband. In dissent, William Douglas, another liberal justice, objected that Brennan's opinion threatened "the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses."

The Most Constitutionally Protected Space

- Despite various erosions on privacy, the home remains our most constitutionally protected space, and the Supreme Court has said repeatedly that any physical intrusion into the home is presumed to be unconstitutional without a valid warrant. This protection was tested and reaffirmed in the *Silverman* case in 1961, when the police were trying to get information from a home they thought was being used for gambling.

- Because they didn't have a warrant, the police convinced the owner of the row house next door to let them use the property as a base for operations. From there, they used a "spike mike" that extended through a crevice and into the interior wall of the house until it made contact with a heating duct in the house of the suspect next door, turning the whole heating system into a sound conductor and allowing the police to hear any conversation in the suspect's house.

- In excluding the evidence and overturning the suspect's conviction, the Court once again cited the *Entick v. Carrington* case for the proposition that the Fourth Amendment protects "the right of a man to retreat into his own home and there be free from unreasonable government intrusion."

- In the *Payton* case, decided in 1980, Theodore Payton was arrested for murder in his home, following a double murder at a gas station two days earlier. In a sweeping rejection of warrantless arrests within the home, Justice John Paul Stevens emphasized that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."

- In 1990, the Court extended Fourth Amendment protections of the home to overnight guests who are only temporarily visiting someone else's home. In *Minnesota v. Olson*, the police were tipped off that Rob Olson, a suspect in a deadly gas station shooting in Minneapolis, had admitted to friends that he had committed the shooting and was planning on fleeing Minneapolis. The police quickly went to the house of the friends to whom Olson confessed.

After being told by a tenant that Olson had returned to the house, the police surrounded the house and made an armed entry into it without a warrant.

- Olson was convicted of first-degree murder. However, the Supreme Court reversed his conviction, rejecting the state's argument that Fourth Amendment protections of the home extend only to those who are "residents" of the home searched. The Court drew a distinction between short-term guests and those who stay overnight.

- For the Supreme Court today, the home remains what it has been for the past two centuries: our most private—and most constitutionally protected—sphere. That principle is being tested by new technologies that allow the police to invade the privacy of the home without physically breaking into the home.

- The challenge was flagged in a series of cases from the 1980s, in which the Court held that the police use of a helicopter to peer into a fenced yard from 400 feet without a warrant didn't violate the Fourth Amendment. Because any member of the public could rent a helicopter to peer into our backyards, the Court suggested in the *Florida v. Riley* case, all of us assume the risk that the police are doing so as well.

- The Court's 1987 decision in *United States v. Dunn* is an example of how the Court has restricted the constitutional boundaries of the home even while reaffirming protections for the dwelling itself. In declaring that "open fields" surrounding a home lack the constitutional protections of the home, the Court defined the home as the dwelling in which the activities of "home life" occurred. In other words, invading someone's private property, which used to be the definition of a Fourth Amendment violation, no longer guarantees that a warrant is required.

The Future of Home Privacy Cases

- Justice Scalia's test—which emphasized that warrants were required only for technologies that could reveal intimate details

of the home and were not in general public use—may prove to be only a temporary victory for privacy. As surveillance technologies proliferate so quickly that they are in general public use, our expectations of privacy will quickly diminish, with a corresponding reduction in constitutional protections.

- One of the major cutting-edge technologies that will threaten the constitutional sanctity of the home in the near future involves smart meters, which can automatically detect the amount of electricity that individual appliances are using. Smart meters are designed to collect—and transmit—"real-time" energy usage, meaning that they update your utility constantly, like a Facebook or Twitter page, about how much power you use. Someone looking at your usage history read by a traditional meter would only be able to tell how much energy you used between meter readings—not how or when you used it.

- Marketers, insurance companies, and even the police hope to access your data for a variety of reasons, and at the moment, there are no rules to protect data from third-party usage. Under the third-party doctrine, when you voluntarily reveal information to the electricity company, you abandon all expectations of privacy in it. However, in the future, the Court might hold that because smart meters can reveal so many intimate details of the interior of the home, the police generally need a warrant to access the data.

Suggested Reading

Barringer, "New Electricity Meters Stir Fears."

Rosen, *The Unwanted Gaze*.

Questions to Consider

1. Compare and contrast the privacy invasions suffered by Monica Lewinsky and John Wilkes. For whom do you have more sympathy? Why?

2. Do you expect helicopters or tiny drone cameras to fly over your backyard and take surreptitious photos of you? Should aerial surveillance by helicopters or drones violate the Fourth Amendment? Should it be regulated by Congress?

Privacy on the Street

Lecture 4

If you really want to protect your privacy, the best thing you can do is stay at home. Once you step outside and walk on the street or drive in your car, your legal rights look very different. All of us are guilty of minor infractions whenever we go out in public, and if the police stop you for a minor infraction, they have broad authority to look for other evidence of wrongdoing. In this lecture, you will learn about your rights in the car and on the street, where you're increasingly being monitored not only by the police, but also by new technologies.

The Lack of Privacy Outside the Home

- Although you have the right to refuse consent for the search of your bags or trunk, in practice, all of us are one step away from a broad search every time we appear in public. If the police find evidence of even a minor offense where the authorized punishment includes an arrest—such as driving without a seatbelt or displaying expired tags—they can arrest you, take you to the police station, and even strip-search you before putting you in jail.

- These broad monitoring powers for the police look very different than the ones the framers of the Constitution anticipated. At the time of the framing, the law generally required that arrests be made by justices of the peace or magistrates rather than ordinary officers.

- Furthermore, the magistrates were generally required to have an arrest warrant. In general, warrantless arrests were permitted only for suspected felonies, not low-level misdemeanors. That's because felonies in the founding era were punishable by death or maiming—punishments that created a strong and understandable incentive for the suspected felon to flee. When it came to minor crimes, there was no comparable incentive and, therefore, no time pressure to make arrests quickly. The preferred method of arresting someone

suspected of a misdemeanor was to issue a summons requiring his of her presence in court.

Searches of Our Cars

- In addition to the fact that the scope and powers of our police forces have grown in ways unimaginable to the framers, the police also have an authority that the framers did not anticipate: the power to arrest and detain individuals for any crime, regardless of how inconsequential it might be.

- The case that established this sweeping power is *Atwater v. Lago Vista* (2001). In 1997, Gail Atwater was arrested, booked, and held in jail for an hour for violating state seatbelt laws. Instead of issuing a citation and despite the fact that violating seat belt laws did not carry the possibility of jail time, Officer Bart Turek arrested her and took her to the police station. After pleading no contest, Atwater received a $50 fine—but not before she was booked, had her mug shot taken, and paid more than $300 for bail.

- Atwater sued the City of Lago Vista and claimed that Officer Turek violated her Fourth Amendment rights by arresting her instead of issuing her a citation. She argued that because her crime was only punishable by a $50 fine and no jail time, her arrest was an unreasonable search and seizure under the Fourth Amendment.

- However, the Supreme Court, in a five-to-four opinion written by Justice David Souter, rejected Atwater's argument that American history and traditions only permitted the police

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If police have probable cause that a person committed a crime, they can arrest that person no matter how minor the crime is.

to arrest individuals without a warrant when they were suspected of committing a felony. Instead, the Court ruled that if there is probable cause for police to believe that a person committed a crime, the police can arrest that person. Any other rule, according to the Court, would put police in too difficult a position to do their jobs effectively.

- The Court rejected a competing rule proposed by four dissenters led by Justice Sandra Day O'Connor: Namely, it should be unreasonable and unconstitutional for the police to arrest for such minor "fine-only" offenses, unless the police officer can point to specific facts that justify an arrest rather than a citation.

- The Supreme Court increased the significance of the rule that people can be arrested for any crime—no matter how minor—by holding in a 2012 case called *Florence v. Board of Chosen Freeholders of Burlington County*. In that case, the Court held that people arrested for the most minor offenses can be strip-searched on arrest, even if there's no cause to suspect them of concealing weapons or drugs.

- In rejecting as "unworkable" the dissenter's rule—that people arrested for minor crimes not involving weapons or drugs should be exempt from strip searches unless the officers have a particular reason to suspect them of hiding contraband—the five-to-four majority opinion written by Justice Anthony Kennedy ignored the historic roots of the distinction between serious and minor crimes. At the time of the framing, juries had the discretion to rule against the government in cases by applying the proportionality principle, which says that the intrusiveness of a search should be proportionate to the seriousness of a crime.

- During the early 20th century, this principle was retained in criminal statutes: In the Prohibition era, for example, it was illegal to sell alcohol, but not to purchase or possess it. That sensible limitation was abandoned, however, during the war on drugs, when Congress and the states imposed ruinous penalties on drug possession and purchase. This effectively spelled the end of the proportionality

principle: Suddenly, the police could approach anyone whom they suspected of carrying a small amount of drugs and do a full-body pat-down or car search, which led to an explosion of racial profiling. At the same time, states increasingly authorized arrests for low-level traffic violations.

- The proportionality principle has eroded further now that the police began to use low-level traffic violations as a pretext for enforcing the drug laws: They can pull over virtually any motorist for speeding or turning without signaling and use the encounter as a pretext to look for drugs. The case that gave a green light to these kinds of searches is *Whren v. United States*, in which the Supreme Court established a rule that police officers can stop any car suspected of violating any traffic law—even if the traffic stop was a pretext for allowing them to search for drugs.

- Taken together, the *Whren* and *Atwater* cases explain why racial profiling on American highways is essentially unregulated. In *Whren*, the Court said that as long as an officer has the legal authority to search and seize a citizen, his or her actual motive for doing so is irrelevant. In *Atwater*, the Court said that the police can arrest a citizen who is guilty of any crime, even a very trivial crime. The two cases allow the police to use trivial crimes like minor traffic violations as a pretext to search and detain people they suspect may be guilty of more serious crimes. With these two rules, officers have unlimited discretion to suspect a subgroup of speeding drivers from the broader universe of drivers and stop them to search for drugs.

- In addition to having broad discretion to stop any cars they like, the police have equally broad discretion to search inside the car once they have probable cause to make a stop. The only meaningful limitation on the search is that police may only search containers that are large enough to hold whatever the police are searching for.

- In *United States v. Ross*, District of Columbia police officers were told by an informant that a man known as "Bandit," who turned out to be Mr. Ross, was selling drugs outside of his car. The police

saw a man matching Bandit's description and stopped him. With the information from the tipster and with a stray bullet that they saw on the front seat, the officers had probable cause to believe that Ross was selling drugs and searched the car. In the glove compartment, an officer found a handgun and took Ross's keys from him to search his trunk. In the trunk, the officer saw a closed brown paper bag, and when he opened it, he found heroine.

- In an appeal of his conviction on drug charges, Ross argued that even if the police had probable cause to believe that his car contained drugs, they did not have reason to believe that the bag in his car contained drugs and, therefore, could not search it. The Supreme Court rejected this argument and upheld his conviction. Where there is probable cause to believe that an entire vehicle has evidence of criminal activity, the Court held, the police have the power to search the entire vehicle and anything in it that might contain the evidence.

- For an officer on the street, the Court recognized, there is really no functional distinction between objects that are in a car and objects that are in a container within the car—both may contain evidence of criminal activity and both are inherently mobile.

- All of these cases giving the police broad discretion to search cars without a warrant as long as the search is "reasonable" stem from cases dating back to the Prohibition era, which was when the Court first stressed the special mobility of cars and the fact that people have a lower expectation of privacy in cars than in the home.

Searches of Our Persons on the Street

- The Court's abandonment of the warrant requirement for searches in public hasn't been limited to cars. When it comes to searches of our persons on the street, the Court has set the bar even lower and has sanctioned the practice of stopping people on the street even if there is no probable cause to believe that they committed a crime. The "stop and frisk" doctrine was created in a landmark 1968 case

called *Terry v. Ohio*, and it has subjected a much larger population to government intrusion.

- *Terry v. Ohio* arose from three arrests made by Cleveland police detective Martin McFadden. On Halloween of 1963, Officer McFadden noticed three men suspiciously monitoring a store in Cleveland's business district and approached them, identifying himself as a police officer and asking their names. When their responses were mumbled, McFadden immediately grabbed one of them, who turned out to be Terry, and patted him down. After feeling a gun from the outside of Terry's coat, McFadden took off the coat and retrieved the gun. He then patted down the other two men, found a gun on one of them, and arrested all three.

- Terry moved unsuccessfully to suppress the gun in the time leading up to his trial, arguing that because McFadden did not have probable cause to believe that he was going to commit a crime, his detention and search were unreasonable.

- The Supreme Court rejected this argument and established for the first time that officers could detain individuals on the street without probable cause or true exigency. Because any arrest without probable cause would be unconstitutional, the Court characterized these stops not as arrests, but as brief detentions necessary for effective law enforcement.

- The Court also upheld the pat-down conducted by McFadden, saying that the safety of the public and the officer required that police have the ability to check for weapons when the officer reasonably believed that an individual might be armed. This justification for search means that pat-downs in *Terry* stops can be conducted only to the extent necessary to allow the police to identify weapons and other threats to the safety of the officer.

- The *Terry* case revolutionized the Fourth Amendment by allowing stops and frisks without probable cause and substituting the reasonableness standard, rather than a judicial warrant, as the test

of a permissible search. Subsequent cases stressed that *Terry* pat-downs are allowed only to protect the officer, rather than search for evidence.

- If an officer finds contraband in the course of a *Terry* stop and arrests you, he or she can then take advantage of a full search incident to arrest, which has none of the limits of a pat-down. In a search incident to arrest, as opposed to a pat-down, for example, the officers can open and search any items found on the person being searched, such as cigarette packages, even if they're in a closed container and even if there's no reason to suspect they contain illegal contraband.

- If you want to avoid an intrusive search by police officers of your person or property, it's important to say "no" when they ask whether you're willing to consent. The Court made clear in *Schneckloth v. Bustamonte* that government agents are not required to inform people of their Constitutional rights to refuse consent, and the refusals must be clear and unequivocal.

Virtual Law Enforcement

- For most of us, our main encounters with law enforcement will be virtual rather than face-to-face. Increasingly, we will be monitored and fined by speed cameras rather than actual officers. In the past decade, neither federal nor state courts in America have been willing to declare the use of remote traffic cameras unconstitutional. The courts' willingness to accept the use of speed cameras does not, however, coincide with the public's view of them.

- Another popular trend in automated traffic enforcement is the use of "smart" parking meters that use account information for payment instead of change. Several major cities in the United States are employing different types of smart parking, and each program poses different privacy concerns. The most obvious privacy issue with smart parking arises when the system being used requires credit or debit card information in order to park.

Suggested Reading

PBS: Think Tank, "Is Racial Profiling Real?"

Goldstein and Ruderman, "Street Stops in New York Fall."

Stuntz, *The Collapse of American Criminal Justice*.

Questions to Consider

1. What do you think about speed cameras? Have you ever received a ticket from one? If so, did you think the fine was fair? Are speed cameras an incursion on liberty or an effective way of getting people to slow down?

2. In Washington, DC, you can be arrested for driving with expired license plates. Once you're booked in jail, according to the Supreme Court, you can then be strip-searched. Is this fair? Do you think the Court should allow arrests and intrusive searches for serious crimes but not low-level crimes?

The Privacy of Travelers

Lecture 5

Anyone who has been to an airport since September 11, 2001, knows how intense airport security can be. Many of us have been subjected to X-ray searches of our bags, full-body scans that can peek under clothing, and pat-downs that have become increasingly intimate. All of these searches can be conducted without a warrant or any suspicion of wrongdoing. In this lecture, you will learn about the rights you have as a traveler and how to assert your rights while traveling in the United States and abroad.

Full-Body Scanners at Airports

- After the terrorist attacks of 9/11, the U.S. government initially installed body-scanning machines that revealed graphic images of the naked body rather than blob machines that show only a sexless avatar with an arrow pointing to the body area that requires secondary screening. Passengers are now given the option of being subject to an intrusive pat-down if they are uncomfortable with the naked body scan.

- It took a political protest to persuade the Obama administration to revisit the machines, at which point Transportation Security Administration (TSA) officials were shocked to discover that they could retrofit half of the naked body scanners with blob-machine-masking technology. The success of the anti-body-scanner protests reminds us that advances for liberty don't always come through the courts; they often reflect the efforts of mobilized citizens.

- The courts refused to intervene during the controversy over the body scanners. When the Electronic Privacy Information Center, a privacy advocacy group, challenged the naked body scanners in the Court of Appeals for the D.C. Circuit, the group argued that a naked body scan is an unreasonable search because it is more invasive than is necessary to detect the presence of weapons, yet it is unsupported by any individualized suspicion.

- The court rejected the challenge, holding that it was not required to compare the intrusiveness of body scanners and pat-downs because travelers could choose which type of search they feel is less intrusive. The court emphasized that the Supreme Court has held that "administrative searches" for purposes of safety rather than law enforcement do not require individualized suspicion. Instead, the court held that TSA's public safety interests outweighed the traveler's privacy interests because TSA had implemented adequate procedures to minimize embarrassment—including placing the agents who viewed the naked images in a separate room where they couldn't see the travelers.

- Although the Supreme Court has held that "nonroutine" searches at the border—such as actual strip searches or body cavity searches—do require a degree of individualized suspicion, the D.C. Circuit refused to treat the naked machines as virtual strip searches and instead viewed them as routine and also refused to consider the other objections to the full-body scanners, including evidence that they are ineffective in detecting powder explosives.

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When going through airport security, you have the right to opt out of primary screening with a body scanner.

Border Searches

- Although the D.C. Circuit's decision may be open to question, it's very much in line with a long history of cases holding that travelers have a reduced expectation of privacy at the border to the United States. In 1789, the first U.S. Congress enacted a customs law that explicitly exempted searches of incoming people and things from probable cause requirements. Ever since, the United States has had

laws permitting the warrantless search of people and items at the border.

- The Supreme Court has yet to hold that any search of property at a border was not "routine" and, therefore, required a higher degree of individualized suspicion. The Court considered the issue of property searches in the case of *United States v. Flores-Montano*, in which a California customs agent hammered off a sealed panel under the gas tank of a station wagon and found 80 pounds of marijuana. The Supreme Court ruled unanimously that the search of the car was "routine" and not intrusive.

- Because of the decisions holding that government can search virtually anything at the border without individualized suspicion, our most intimate possessions—including our smartphones and computers, which hold all of our most private documents—are now vulnerable to being searched and seized virtually without limits while we're traveling.

- In *United States v. Arnold* (2008), the Ninth Circuit in California ruled that broad searches of a laptop's electronic files at the border is no more offensive than the search of a traveler's briefcase, luggage, purse, wallet, pocket, or papers—all of which had already been ruled to be "routine."

- The constitutional status of computers and iPhones remains hotly debated in lower courts, with some judges treating computers like any other luggage and others insisting that they be viewed as digital file cabinets that contain many separate, closed containers of segregated data.

- The most common "nonroutine" searches are strip searches and body cavity searches. Courts applying the "real suspicion" standard have ruled that real suspicion can be based on a tip from a reliable informant, the appearance that a traveler is concealing something on her person, or inconsistent statements in response to questioning.

- While the Supreme Court has not set forth a definitive test for the reasonableness of a body cavity search at the border, courts have consistently required more than real suspicion that the traveler is carrying contraband. Generally, the officials who suspect contraband must conduct a strip search first in order to determine that there is a significant likelihood that the traveler has concealed contraband within a body cavity.

- Where practicable, officials may require the traveler to undergo an X-ray. Doctors may also be consulted to administer substances tending to cause the excretion of concealed objects or to conduct a probe—as long as it is done in a medical setting in a medically approved manner. The Supreme Court has held, however, that the use of a stomach pump constitutes "conduct that shocks the conscience" and, therefore, violates due process.

- Although a traveler may be detained for several hours during the course of a routine border search, the Court held that an extended detention might be permitted when one is suspected of being a type of drug courier known as a balloon swallower. In *United States v. Montoya de Hernandez* (1985), the Supreme Court held that a woman's 16-hour detention was valid because the customs officials had a "reasonable suspicion" that the woman had swallowed balloons of cocaine.

Privacy on Trains, Buses, Subways, and Ferries

- For decades, air travelers have been subjected to much tighter security procedures than other domestic travelers. However, the Department of Homeland Security has recently suggested that security on public transportation must be beefed up. Although TSA hasn't yet announced plans to use body scanners on public buses, a TSA program called Visible Intermodal Prevention and Response (VIPR) now conducts airport-style searches for weapons at ferry terminals, rail stations, and bus stations.

- In July 2005, terrorists launched two devastating bomb attacks on the London Underground system. On the day of the second attack,

New York City initiated its Container Inspection Program. The purpose of the program was to deter people from bringing concealed explosives into the subway system. Inspection teams were deployed at selected stations and informed passengers that they could choose to leave the subway if they did not want to submit to a visual search of their belongings.

- Critics said that giving people the option of avoiding a search by simply entering at another station undermined the effectiveness of the program. Despite these criticisms, the U.S. Court of Appeals for the Second Circuit decided that the Container Inspection Program served the purpose of deterring terror attacks on the subway system.

- Justice Sonia Sotomayor, when she was an appellate judge, applied the reasoning of the New York City subway case to a later case involving random visual searches of bags and vehicles on a ferry that carried passengers across Lake Champlain between Vermont and upstate New York. Judge Sotomayor wrote that passengers maintained a full expectation of privacy in their bags and vehicles when they boarded the ferry, but she decided that the government intrusion on that expectation was minimal, reasoning that the searches were visual, brief, and announced in advance.

- The court refused to find the searches unreasonable because metal detectors could have been used less intrusively and stated that the reasonableness of a search should be determined on a standalone rather than a relative basis. Judge Sotomayor wrote that the Coast Guard's conclusion that terror attacks on ferries would be deterred by visual searches constituted a "special need," regardless of the specific likelihood of an attack on the Lake Champlain ferry.

Asserting Your Rights as a Traveler

- If you are at an airport and are questioned by TSA officers, you may decline to answer or may respond to each question by politely saying, "That's my personal business." If the officer believes that you are evading his or her questions, then he or she may select you for secondary screening.

- You also have the right to opt out of primary screening with a body scanner and to opt out on behalf of your children. However, you will then be required to submit to a pat-down if you wish to board your flight. Once again, remember to be polite and clearly say, "I opt out."

- If you are subjected to a pat-down search by TSA personnel, you are entitled to have the search conducted by an agent of the same sex, explain any injuries or conditions that could be exacerbated or any medical devices that could be dislodged by a search, request a private area for the search, bring a witness with you or request TSA to provide a witness, and keep your head covering on if your religion does not allow you to remove it. If you feel that a TSA agent has violated your rights, you can complain to the Department of Homeland Security.

Traveling with Technology

- Under the agency directives of the Immigration and Customs Enforcement Agency, searches of electronic devices are allowed without individualized suspicion, and agents can confiscate a digital device for up to 30 days. Your devices and data may not, however, be transported away from the border without individualized suspicion.

- Customs agents may attempt to bypass your passwords and encryption by using a common tactic known as a "cold boot attack," in which someone with access to a computer retrieves the encryption keys from the operating system after rebooting it. To avoid this tactic, make sure that your device is completely shut down before going through customs.

- In addition to using cutting-edge encryption techniques, technology specialists suggest securely deleting nonessential data from devices. If you can afford a separate travel laptop, that may be your best option.

- If there's information that you want to access overseas but don't want to bring through customs, you can store it on a secure server and use an encrypted transmission to access it once you are overseas. However, the government might monitor or record your transmissions and even attempt to crack your encryption.

- A similar problem arises when you create electronic files, such as photographs, overseas but don't want to bring those files back through customs with you. Although the government may not monitor your communications without a warrant once you are back in the United States, it can subpoena data and communications stored by third-party providers under the Electronic Communications Privacy Act.

Asserting Your Rights Abroad

- When entering or leaving foreign countries, U.S. citizens are not protected by the Fourth Amendment and, instead, are subject to local laws. As a result, U.S. citizens who go abroad should inform themselves about the applicable law in advance of their travels.

- As a general rule, U.S. citizens can expect that they and their belongings will be searched for contraband when they enter, or sometimes when they leave, foreign countries.

- Many countries permit suspicionless searches and so-called investigative detention, which permits police to detain a suspect without charge for a period of time.

- If a U.S. citizen is arrested or detained overseas, U.S. consular officers cannot intervene in a foreign country's court system or judicial process to obtain special treatment. However, you have the right to speak with a U.S. consular official.

Suggested Reading

Rosen, "Why the TSA Pat-Downs and Body Scans Are Unconstitutional."

Rule, *Privacy in Peril*.

Questions to Consider

1. Have you ever gone through a naked body scanner at an airport? Did it bother you? Given the choice between the naked machine and the blob machine, which would you choose?

2. What's your worst travel experience with airline security? How did it make you feel? What could the agents have done differently? Do you think the post-9/11 security measures make us safer?

Privacy and National Security

Lecture 6

In the national security cases since 9/11, Republican and Democratic presidents have resisted the kinds of privacy protections that might protect liberty and security at the same time, including judicial oversight of their actions. Instead, they have insisted on a right to make their own decisions about what security requires. It may be appropriate for the government to have extensive authority to investigate suspected terrorists, but the same powers shouldn't be used to surveil and prosecute innocent citizens or low-level wrongdoers.

The Perfect Citizen Program

- In 2010, a program called Perfect Citizen was designed to identify cyber assaults on critical infrastructure controlled by the private and public sectors. Defenders of Perfect Citizen say that it's necessary to subject the private sector to the same detection systems that could prevent cyber attacks that might bring the entire communications network to its knees. Critics say that by surveilling millions of private communications without a warrant, Perfect Citizen represents precisely the kind of general search that the framers of the Fourth Amendment to the Constitution meant to forbid.

- Perfect Citizen appears to represent an extension into private networks of cyber attack detection and prevention systems currently in place on government computers. Jack Goldsmith of Harvard Law School argues that the current intrusion detection system, known as Einstein 2, is being supplanted by an intrusion prevention system, known as Einstein 3, which will use sensors to detect malicious attacks on privately owned computer networks and Internet service providers to stop them in real time before they can reach government computers.

- Goldsmith imagines that Perfect Citizen might extend Einstein throughout public and private computer networks and that the

government might require a threat detection system to monitor all communications, public and private, without a warrant.

- Courts have held that there's no reasonable expectation of privacy in private communications information and, thus, that the government's collection and analysis of such information does not implicate the Fourth Amendment. Still, Goldsmith notes, Perfect Citizen may not be authorized by existing statutes and might need additional congressional endorsement to be legal.

- Goldsmith concludes that the collection (or copying) and analysis of bulk communication content is another matter. Some courts might be inclined to approve it under two existing doctrines: the third-party doctrine, which holds that when you disclose information to third parties you assume the risk that the information may be disclosed to the government, and the special needs doctrine, which makes an exception to the Fourth Amendment warrant requirement for reasonable governmental actions with a purpose that goes "beyond routine law enforcement."

- Still, to be reasonable under the totality of the circumstances, Goldsmith concludes that Perfect Citizen would have to be implemented with at least three privacy-protecting mechanisms: storage and viewing (only suspicious communications are viewed by humans, rather than computers), use restrictions (only cyber threats, not lesser crimes, are targeted), and minimization (nonthreatening communications are destroyed).

Computer-Assisted Passenger Prescreening System (CAPPS II)

- The Computer-Assisted Passenger Prescreening system (CAPPS II) was deployed at American airports after 9/11. According to the Transportation Security Administration, the administration assigned all passengers at American airports a "threat index score" based on their perceived trustworthiness.

- Under the program, each passenger's name, address, home phone number, and date of birth was linked to two commercial databases,

LexisNexis and Axiom, which collect information about consumer habits. The data may not contain medical or bank account information but may include information about passengers' buying patterns and locations of family members, for example. Based on the information, passengers were assigned to green, yellow, or red categories and were subjected to correspondingly intrusive scrutiny.

- In terms of the information that the government uses, LexisNexis obtained it legally from sources with whom you shared it—from magazines and newspapers to online and offline stores. Sharing that kind of consumer data isn't heavily regulated in the United States, unlike in Europe, and once a private company has legally obtained the data, the government is free to rely on it as well.

- In its initial announcement, the administration proposed to share personal data from the CAPPS II system with national and international police to allow the prosecution of any civil or criminal violations. However, critics objected that this could create widespread abuses, allowing the administration to scour the personal data of millions of people, uncover relatively minor offenses, and threaten its critics with vindictive prosecutions—similar to the way in which Richard M. Nixon scoured the tax returns of Vietnam protesters.

- In response to these criticisms, the Transportation Security Agency agreed to restrict officials from sharing personal data with law enforcement agencies, except for individuals who had an outstanding federal warrant for a violent crime. This was a welcome and important victory for privacy.

- Some additional checks and balances would be helpful. People need a chance to correct their data, for example, and the system should be legally restricted to airports to ensure that citizens' threat rankings don't trail them in all of their interactions with the government. However, the attempt to limit the search for data and sharing of personal information—so that the system is focused on the most dangerous suspects and criminals rather than on trivial offenses—

could be a model for balancing privacy and security throughout the federal government.

The USA PATRIOT Act

- The USA PATRIOT Act could easily be amended so that it protects privacy and security at the same time. The most controversial provisions of the Act have proved to be the ones that vastly expand the government's authority to search private records and other personal data without notifying a suspect.

- Before passage of the act, the government could search certain personal records—including hotel, airline, and car rental records—if it could provide evidence to suggest that the records were those of a spy or terrorist. Section 215 of the PATRIOT Act extended the government's reach to include all tangible information, such as bookstore receipts and library records. The government need not tell the targets their records are being searched, and the record keepers are not allowed to. Under the Act, the government no longer needs to certify in advance that its target is a suspected spy or terrorist, so there is a huge risk of abuse.

- To protect citizens from potential abuses, a bipartisan coalition in the House and Senate introduced the Security and Freedom Ensured (SAFE) Act, which—if passed—would resurrect the requirement that secret searches can only be conducted on those who are suspected in advance of espionage or terrorism, reserving the most intrusive surveillance for the most dangerous suspects.

- In the face of legal challenges to the constitutionality of Section 215, Congress amended the act to allow those who receive a demand for records to consult with a lawyer and challenge the demand in court.

- Other controversial provisions of the PATRIOT Act remain in place without privacy protections, however. For example, the Act lowers the bar for launching federal wiretaps and searches of suspected terrorists and allows the government to summarily deport foreign nationals it deems potential threats to national security. This

provision has been deployed frequently in immigration matters, despite the lack of any evidence of a connection between the deployed individual and terrorism.

Torture and Mistreatment of Prisoners

- Next to Section 215, the most controversial post-9/11 surveillance measures have involved warrantless wiretapping. In 2002, President Bush authorized the National Security Administration (NSA) to circumvent the Foreign Intelligence Surveillance Act and intercept, without a warrant or subpoena, the electronic communications of persons inside the United States suspected of being affiliated with terrorist groups.

In January 2002, the first captives of the "war on terror" arrived at the U.S. detention center at Guantanamo Bay, Cuba.

- As controversial as the Bush administration's defense of surveillance at home was its defense of torture abroad. In 2002, lawyers for the Bush administration produced a series of memos explaining why the Geneva Conventions' prohibitions against torture and mistreatment of prisoners should not apply to members of the Taliban and al-Qaeda. Department of Defense memos in 2002 and 2003 authorized various forms of torture and provided legal rationales for exempting officials from domestic and international prohibitions of torture.

- In a series of terrorism decisions, the Supreme Court decisively rejected the Bush administration's argument that judges should play no role in supervising the president's conduct in the war on terror. The legal challenges began soon after January 2002, when the first

captives of the "war on terror" arrived, wearing masks, earmuffs, and shackles, at the U.S. detention center at Guantanamo Bay, Cuba.

- One of the earliest detainees was Yaser Hamdi, a U.S. citizen captured in Afghanistan by Northern Alliance forces. Hamdi was detained at Guantanamo and was transferred to a military brig in the United States after it was determined that he was a citizen. Hamdi filed a petition for a writ of habeas corpus, challenging his detention, but the government argued that he was not entitled to habeas review because he had been captured on the battlefield. The Supreme Court ruled in June 2004 that, as a U.S. citizen, Hamdi was entitled to habeas corpus or a legally adequate substitute to determine if he could be detained as an enemy combatant.

- On the same day that it announced its decision in *Hamdi*, the Court announced its decision in *Rasul v. Bush*—that foreign nationals held at Guantanamo Bay were entitled to petition for habeas corpus or a legally adequate substitute. The Court based its decision on the fact that Guantanamo Bay was not a battlefield or the territory of a foreign sovereign but, rather, was under the complete jurisdiction and control of the United States.

- In the wake of the *Rasul* and *Hamdi* decisions, Congress passed the Detainee Treatment Act (DTA) of 2005, stripping the federal courts of jurisdiction over habeas corpus petitions and military commission trials of Guantanamo detainees. Under the DTA, detainees were entitled to military hearings called Combatant Status Review Tribunals (CSRT) to determine whether they were "enemy combatants" who could be detained.

- In 2008, the Supreme Court decided the case of *Boumediene v. Bush*, ruling that the CSRT were procedurally inadequate as a substitute for habeas corpus. After *Boumediene*, Guantanamo detainees were able to challenge their detention in federal district court in Washington, DC.

The Future of the War on Terror

- When President Obama took office, he quickly announced an executive order establishing an Inter-Agency Task Force to review the files of the remaining Guantanamo detainees and make recommendations as to how to proceed. The review separated the detainees into three categories: those who can be released, those who can be charged with crimes or war crimes and will be tried in military courts, and those who cannot be charged with crimes but are too dangerous to release and, therefore, face indefinite detention.

- The most controversial antiterror policy of the Obama administration has been its use of drones to target American citizens. Anwar al-Awlaki was an American citizen who became a leader of the terrorist group al-Qaeda in the Arabian Peninsula. He was allegedly involved in the Fort Hood massacre in 2009 and the attempted bombing of a Detroit-bound flight on Christmas Day that same year by the so-called underwear bomber, Umar Farouk Abdulmutallab.

- After reports suggested that al-Awlaki had been placed on a list of terrorists targeted for killing by U.S. predator drone strikes, al-Awlaki's father filed a case in federal court, arguing that a strike against a U.S. citizen would be unconstitutional. The United States successfully had the case thrown out of court because it would require the government to divulge state secrets.

- In September 2011, al-Awlaki was killed by a U.S. predator drone strike in Yemen. Following the targeted killing, President Obama was called upon to state the legal justification for the killing and release portions of the classified legal memorandum upon which it relied. In March 2012, Attorney General Eric Holder gave a speech explaining the circumstances in which the government can direct lethal force at a U.S. citizen.

- According to Holder, three conditions must be met for a targeted killing to be justified. First, the government must determine that the individual being targeted "poses an imminent threat of violent

attack" against the United States. Second, capturing the individual must not be a feasible alternative. Third, the operation must be conducted in a manner consistent with four fundamental rules of war: The target must have military value, the target must be lawful, collateral damage must not be excessive, and the weapons chosen must not "inflict unnecessary suffering."

Suggested Reading

Risen and Lichtblau, "Bush Lets U.S. Spy on Callers without Courts."

Rosen and Wittes, eds, *Constitution 3.0*.

Questions to Consider

1. The most controversial provision of the USA PATRIOT Act is Section 215, which allows the government to seize any tangible data—such as bookstore receipts or library records—by certifying that it's "relevant to a terrorism investigation." The government need not tell you if your records are being seized. How do you feel about Section 215? Does it make you feel safer, or does it threaten to violate privacy?

2. What do you think about targeted drone strikes? Should the U.S. government be able to kill U.S. citizens after determining that they pose a threat of imminent attacks on the United States? How might the use of drones for national security and police work increase in the future, and what sort of regulations do you think are necessary?

Privacy in the Courtroom

Lecture 7

In this lecture, you will learn about the privacy guaranteed by the Fifth Amendment, which states, "No person shall be … compelled in any criminal case to be a witness against himself." In modern times, the Fifth Amendment does not protect any mental privacy. To understand how that is possible, you need to understand the Fifth Amendment's remarkable history. In addition, in considering future Fifth Amendment issues, you will discover that despite advancements in technology, neuroscience will never identify the mysterious point at which people should be excused from responsibility for their actions because they are not able to control themselves.

Protecting Mental Privacy

- When the framers of the Fifth Amendment thought about mental privacy, there was one interrogation in particular they had in mind—that of the English Puritan John Lilburne. After his conversion in 1630, Lilburne spent his life publicly criticizing the English monarchy for its heavy-handed methods of dealing with Puritan dissenters. In 1637, he was arrested for smuggling books by a Puritan doctor named John Bastwick, who had been arrested for publishing criticisms of English bishops. Bastwick was sentenced to life in prison for seditious libel and had both of his ears cut off by the crown.

- Lilburne was first brought before the attorney general and questioned, apparently without any brutality. He readily answered questions about the books he was distributing but refused to answer questions when asked about Bastwick and other people that the interrogators demanded to know about.

- Upon his refusal to answer, Lilburne was brought before the Star Chamber. The terror of the Star Chamber was its adoption of the oath ex officio, which required anyone brought before the Chamber

to swear to tell the truth and to answer any questions asked of them without knowing the subject matter in advance.

- Once that oath was given, the accused faced what became known as the "cruel trilemma" of incriminating themselves, perjuring themselves to avoid punishment, or remaining silent and facing contempt charges. In an age when people took oaths to God seriously, the punishment for lying under oath was widely believed to be eternal damnation.

- When Lilburne refused to take the oath ex officio, he was charged with contempt, thrown into prison, and given four days to submit to questioning. Lilburne was lashed 50 times on the pillory, but instead of submitting, he pulled copies of the banned books from his pockets and threw them into the crowd, crying out that the books were about the very abuse he was suffering. He also insisted to the crowd that the Star Chamber oath violated the law of God.

- The public outcry over the treatment of Lilburne and the conduct of the Star Chamber turned opinion in favor of the Puritans. Ultimately, Lilburne was freed from the sentence of the Star Chamber not by a jury or writ, but by an act of Parliament—a first in English history. The same Parliament later abolished the Star Chamber and the oath ex officio in 1641, a direct result of the Lilburne trials and the public outcry that they caused.

- From the framers of the Constitution to the mid-20th century, America has generally recognized the right against self-incrimination. For most of the 19th century, American law was sensitive to distinctions among different kinds of lies and refused to punish people for answering questions untruthfully that by any civilized standard should never have been asked in the first place. It was only in the post-Watergate era that almost any misrepresentation to a federal official became a potential felony. As a result, there is now a gap between the kinds of lies that most people think should be illegal and the kinds that the law actually forbids.

The Fifth Amendment to the U.S. Constitution was driven by a desire to spare people from incriminating themselves—specifically, so that a person would not have to be a witness against himself or herself.

- For most of English and American history, defendants were not put under oath in the first place because it was considered a form of moral torture to force them to choose between self-incrimination and eternal damnation. In a similar concession to the human instinct for self-preservation, prosecutors almost never pursue a perjury charge once a defendant who has proclaimed his or her innocence on the stand is found guilty.

- Because defendants were viewed as inherently unreliable, their testimony, unlike that of witnesses, was not taken under oath until after the Civil War. At the end of the 19th century, Southern states began to introduce the defendant's oath. The famous perjury trials in America, from Alger Hiss to H. R. Haldeman, are 20th-century affairs.

- In the post-Watergate era, prosecutors used an old law called the False Statements Act, which prohibits "any false, fictitious, or fraudulent statements" to federal officials, even if the statements weren't made under oath. The predecessor of the False Statements Act was originally adopted during the New Deal to cover any

statements by citizens to government agencies. The law was invoked during the 1980s and 1990s by a parade of independent counsel to punish unsworn lies to FBI agents, Congress, and eventually, the independent counsels themselves. As a result, the day-to-day enterprise of politics has become a very risky affair.

- During the past few decades, some judges began to worry about the fairness of prosecuting people for the natural impulse to deny that they are guilty. As a result, several federal courts carved out an exception to the False Statements Act, which they called the "exculpatory no." According to the "exculpatory no" doctrine, if you do nothing more than deny your guilt, without actively misleading federal investigators, you haven't committed a federal felony.

- In *Brogan v. United States* (1998), the Supreme Court ruled that lower-court judges had exceeded their authority by creating an "exculpatory no" exception. Writing for the Court, Justice Antonin Scalia declared that the False Statements Act doesn't make any exception for any kind of lies, including the self-protected lies known as the "exculpatory no."

- At the same time that the Supreme Court expanded opportunities for prosecuting people for self-protective lies, it reduced the Fifth Amendment protections for private papers and other documents prepared by defendants in the case of *Schmerber v. California* (1966). In a controversial opinion, the Court announced a new rule for determining when the Fifth Amendment applies: The protection against self-incrimination applies not to physical evidence but only to "testimonial or communicative" evidence, such as a defendant's statements or the result of polygraph exams, where he or she is attempting to communicate something about his or her mental state.

- The Court's reasoning in *Schmerber* constricted the scope of the Fifth Amendment in two ways. First, the Court emphasized that although the Fifth Amendment was driven by a desire to spare people from incriminating themselves, the text of the amendment only does this to the extent that the person will have to be a

witness against himself or herself. That means that the amendment provides only limited protections for mental privacy—because the government can always grant you immunity and then force you to talk about whatever it likes.

- Second, the Court defined the personal interest protected by the Fifth Amendment to be the "inviolability of the human personality." By framing the right in this way, the Court limited the protections of the Fifth Amendment to only those cases where forcing a person to speak would subject him or her to the cruel trilemma.

- The Court applied the testimonial rule from *Schmerber* in another series of cases that held that a person's papers, no matter how sensitive or personal they are, have no protection under the Fifth Amendment—because they are not "testimonial."

- In *Fisher v. United States* (1976), the IRS subpoenaed the accountants of two taxpayers for the taxpayers' tax forms. The only protection of private papers that *Fisher* left for individual citizens is the right (in certain limited circumstances) to not have the act of producing papers used against them in court.

Future Fifth Amendment Issues

- Some of the most vexing Fifth Amendment issues of the future will involve technologies of lie detection that are becoming much more accurate and, correspondingly, more intrusive.

- At the beginning of the 21st century, there are two leading lie-detection technologies that rely on neuroimaging, although the value and accuracy of both are sharply contested. The first, developed by Lawrence Farwell in the 1980s, is known as brain fingerprinting. Subjects put on an electrode-filled helmet that measures a brain wave called P300, which changes its frequency when people recognize images, pictures, sights, and smells. By detecting not only lies but also honest cases of forgetfulness, the technology could expand our very idea of lie detection.

- The second lie-detection technology uses functional magnetic resonance imaging (fMRI) machines to compare the brain activity of liars and truth tellers. This technology is based on the premise that certain areas of the brain light up when people lie. Currently, fMRIs used as lie detectors are currently in the 80-percent accuracy range, which is similar to the rate for polygraphs. If and when they reach the 90-percent range and are admitted in court, they will raise vexing questions of self-incrimination and privacy.

- Equally vexing legal questions might arise as neuroimaging technologies move beyond telling whether someone is lying and begin to identify the actual content of memories. Even if witnesses don't have their brains scanned, neuroscience may lead judges and jurors to conclude that certain kinds of memories are more reliable than others because of the area of the brain in which they are processed. Further into the future, and closer to science fiction, lies the possibility of memory downloading.

- Lie-detection and memory-retrieval technologies could pose a serious challenge to our freedom of thought, which is now defended largely by the First Amendment protections for freedom of expression. This may challenge the principle that we should be held accountable for what we do—not what we think.

- There are other ways to look inside the brain and make predictions about an individual's future behavior. In fact, neuroscientists are trying to find the factors in the brain that are associated with violence. PET scans of convicted murderers were first studied in the late 1980s by Adrian Raine, who found that their prefrontal cortexes, areas associated with inhibition, had reduced glucose metabolism and suggested that this might be responsible for their violent behavior. His current research uses fMRIs to study moral decision making in psychopaths.

- Some scholars think that using brain scans to predict violent tendencies and sexual predilections will allow prosecutors to

introduce a spot in the brain as a sign of future dangerousness when someone is up for parole.

- Other scholars see little wrong with using brain scans in this way—as long as the scans are used within limits. Rather than preventatively detaining someone whose brain suggests future dangerousness, they argue, the police could keep track of the suspects with GPS tracking. These scholars imagine that predictive technologies will be enlisted in the war on terror, perhaps in radical ways.

- The idea of holding people accountable for their predispositions rather than their actions poses a challenge to one of the central principles of Anglo American jurisprudence: namely, that people are responsible for their behavior, not their proclivities—for what they do, not what they think. As a result, some scholars have called for a new conception of "cognitive liberty" that would view the skull as a privacy domain.

- There may be similar battles of cognitive liberty over efforts to repair or enhance broken brains. A remarkable technique called transcranial magnetic stimulation (TMS), for example, has been used to stimulate or inhibit specific regions of the brain. It can temporarily alter how we think and feel. Some neuroscientists believe that TMS may be used in the future to enforce a vision of therapeutic justice, based on the idea that defective brains can be cured.

- Not all scholars are convinced that neuroscience will transform not only our notions of mental privacy, but also of criminal responsibility. American law holds people criminally responsible unless they act under duress or if they suffer from a serious defect in rationality. However, if you suffer from a serious defect, the law generally doesn't care why. To suggest that criminals could be excused because their brains made them do it seems to imply that anyone whose brain isn't functioning properly could be absolved of responsibility.

Suggested Reading

Gazzaniga, *The Ethical Brain*.

Gregg, *Free-Born John*.

Rosen, "The Brain on the Stand."

Questions to Consider

1. Compare and contrast the legal ordeals suffered by John Lilburne and John Wilkes, which gave rise to the Fifth and Fourth Amendments. Both were suspected of publishing seditious libel criticizing royal authorities. Does it make sense to base our modern protections for privacy on constitutional amendments that were designed primarily to prevent the police from locking up critics of the king by using their published words against them?

2. Discuss the use of brain scan technologies to detect lies. Are some lies worse than others? When should people be given a pass for lies they tell to deny their own guilt? How could the proliferation of technologies that can tell whether someone is lying by hooking him or her up to a brain scan transform the ways trials are conducted?

Privacy in the Police Station

Lecture 8

Although intended to provide strong protections for private papers and diaries and for freedom of conscience, the Fourth and Fifth Amendments provide little protection for mental privacy today. As a result, the police have broad powers to induce a suspect to confess—sometimes even falsely—without extensive judicial oversight. In modern times, the main protection against abusive interrogation by the state comes from a single Supreme Court case: *Miranda v. Arizona*, decided in 1966.

Competing Views about Confessions

- Before *Miranda v. Arizona* was decided in 1966, two views about confessions competed in the Supreme Court: Did confessions have to be completely free and voluntary, or could they be admitted as long as they weren't coerced by torture or threats? The Court endorsed a version of the first view in the *Bram* case from 1897, when it began enforcing the Fifth Amendment against the federal government.

- Bram was the first mate on an American ship traveling from Boston to South America. While off the coast of Nova Scotia, the captain and his wife were murdered in the early morning hours with an axe. The next day, a shipmate named Brown was taken into custody for the murders. While in custody, Brown accused Bram of committing the murders. The detective who questioned Bram told him that he had spoken to Brown, who claimed to have seen Bram commit the murders—to which Bram replied, "He could not have seen me. … He could not have seen me from [the wheel]." His statements were admitted at trial as a confession, and Bram was sentenced to death.

- On appeal, Bram argued that his statements to the detective were involuntary. The Supreme Court agreed with Bram and threw out both his confession and conviction. The opinion is notable for setting an extremely high bar for the effect of inducements and

threats in confessions. "A confession, in order to be admissible, must be free and voluntary," the Court held. The Court declared that any inducement or threat, presumably anything other than asking questions, could make a confession inadmissible.

- The Court took a less expansive view in the early 20th century when evaluating the abusive interrogations of African Americans in the South. The most notorious of these cases is *Brown v. Mississippi*, in which the Supreme Court began reining in the procedures of state courts through the Fifth and Fourteenth Amendments.

- In 1934, the body of a murdered white man named Raymond Stewart was found in Mississippi. In response, a mob accompanied by a sheriff's deputy attacked the home of Arthur Ellington and dragged him outside. Once outside, the mob severely beat him, tied a noose around his neck, and began to hang him. After some time, they dropped him to the ground and told him to confess to the murder. When Ellington said he was innocent, they hung him again, and when dropped, he again said that he was innocent. At that point, he was tied to a tree and severely whipped, but he continued to maintain his innocence and was let go.

- Two days later, the same deputy came to the home of another suspect, Ed Brown, arrested him, and took him across the border into Alabama. Once in Alabama, the deputy stopped the car and started severely beating Brown, telling him that he would not stop until he confessed, which Brown eventually did. The confession was used against him in a sham trial where deputies proudly testified to the beatings. In overturning Brown's conviction, the Supreme Court drew the line at confessions obtained by violence.

- For most of the 20th century, the Brown rather than the Bram standard governed the admission of confessions in state trials: Any confession made to the police during a custodial interrogation was admissible against the defendant unless the statement was involuntary in the sense of being coerced.

- In 1959, the Supreme Court laid out the minimal protections of due process in *Spano v. New York*, in which the Court held that confessions should not be excluded from trial unless they are involuntary.

Miranda v. Arizona

- The Court's decision in *Miranda v. Arizona* requires officers to inform people in custodial interrogation that they have the right to remain silent, the right to have a lawyer present at any questioning, and—if they request a lawyer—the right to have the police stop the interrogation until the lawyer is present.

- In *Miranda*, the Court emphasized the deceptive practices used by police—such as isolating the target, minimizing moral seriousness of the crime, and denying an attorney—all of which had been legal because they did not violate due process under *Spano*. The Court also extended constitutional protection to anyone in the custody of the police because coercion can be just as effective in custody as after arrest.

Miranda **flatly stated that interrogation must cease as soon as the person being questioned indicates that he or she wants a lawyer.**

- Because *Miranda* flatly stated that these warnings must be given and that interrogation must cease as soon as the person being questioned indicates that he or she wants a lawyer, the single most important thing that anyone faced with police questioning can do to protect themselves is to say, clearly and unequivocally, "I want a lawyer!"

- For nearly 40 years, the Supreme Court chipped away at the *Miranda* guarantees. In a series of cases, the Court suggested that *Miranda* wasn't required by the Constitution and held that even if the police get a confession without proper *Miranda* warnings, they can still use that confession to get more information as long as they don't use the confession in court. That led many observers to imagine that the Court would overturn *Miranda* when given the chance, but in *United States v. Dickerson* (2003), Chief Justice William Rehnquist wrote a seven-to-two opinion for the Court upholding *Miranda*.

- Critics of *Miranda* argue that the case has prevented criminals from being caught or allowed innocent people to be wrongly accused because the police can't get a confession from the real suspect. However, other scholars have concluded that *Miranda* hasn't significantly affected the ability of the police to obtain confessions.

False Confessions

- Since DNA evidence has been used to definitively exonerate large numbers of convicts, approximately 15 to 25 percent of those who have been exonerated were originally convicted at least in part because of false confessions. While this number is disturbing, it appears as though it might be low—because 81 percent of false confessors who go to trial are eventually convicted.

- Studies of cases involving false confessions have identified some clear trends in the types of crimes and the types of defendants that most commonly produce false confessions. These studies have found that false confessions are more common in more extreme violent crimes, perhaps due to increased police interrogation

pressure. However, police pressure—such as repeated questioning that exhausts the suspect—doesn't violate the *Miranda* warnings or the Fifth Amendment unless it's extreme. In the case of false confessions, the impulse is to make the coercive interrogation stop.

- Studies have also shown that there are several variables at play when determining who is most likely to make a false confession, including age and mental competency of the defendant. In addition, situational risk factors such as isolation and extended interrogation have been shown to have a large impact on the rate of false confessions. The presentation of false evidence—including the presence of a false witness—is another factor that has unsurprisingly been proven to induce innocent people to confess. Furthermore, threatening suspects with harsh punishments has proven both common and effective in inducing false confessions.

- In one study of the process of false confessions, Brandon Garrett of the University of Virginia discovered a number of practices that not only pressured convicts to confess, but also made it possible for them to do so. For example, because innocent suspects typically do not know the details of the crime to which they confess, leading questions or introducing details into the interrogation can lead the suspect to include details in a confession that they were not aware of beforehand.

- Other common practices used in confessions that lead to false confessions include taking a suspect to the scene of the crime, but Garrett's study indicates that just as often, a willing or compliant suspect who is trying to confess falsely will be able to simply guess certain facts of the crime from the circumstances of the interrogation.

- False confessions can lead to wrongful convictions. Since the late 1980s, DNA testing has exonerated more than 250 wrongly convicted people, who spent an average of 13 years in prison for crimes they didn't commit; 17 of the 250 people were sentenced to die, and 80 were sentenced to spend the rest of their lives in prison.

- By poring over trial transcripts and interviewing lawyers, prosecutors, and court reporters, Brandon Garrett has explored who these 250 innocent people are and why they were wrongly convicted. His alarming conclusion is that the wrongful convictions were not idiosyncratic but resulted from a series of flawed practices that the courts rely on every day—namely, false and coerced confessions, questionable eyewitness procedures, invalid forensic testimony, and corrupt statements by jailhouse informers.

- In many of these cases, the police—intentionally or not—fed details of the crime to the suspects and then recorded only portions of the interrogations so that it was difficult for defense lawyers and jurors to reconstruct the truth.

- Unfortunately, the Supreme Court has refused to focus on whether confessions are reliable, asking instead whether the confessions were coerced or offered without *Miranda* warnings. Garrett states that the best protection against false confessions would be to require that police record interrogations from beginning to end.

The Misidentification of Eyewitnesses

- In addition to false confessions, eyewitnesses wrongly identified the accused in 76 percent of the 250 cases that Garrett examined. The unreliability of witness identifications is now widely known, but it's surprising to discover how flagrantly unreliable the procedures were in the cases he examined.

- In 78 percent of the trials, he found evidence that the police contaminated the eyewitness identifications with suggestive methods. While the witnesses were confident by the time of the trial that they had identified the right suspect, in more than half of the cases, they had not been confident at the time of the initial identification. Of those exonerated by DNA, 70 percent were from minorities, and in nearly half of the rape cases involving blacks or Hispanics, the victims were white.

- The Supreme Court has allowed lineups that were unfairly conducted, but the best way to avoid erroneous identifications is to use a double-blind procedure, where police officers can't influence the witness because they don't know which person in the lineup is the suspect.

- In 10 percent of the cases, appellate courts called the evidence of the innocent people's guilt "overwhelming" while the Supreme Court summarily dismissed requests to review 37 of the cases without giving reasons.

- The Supreme Court signaled its unwillingness to evaluate the reliability of lineups in *Perry v. New Hampshire* (2012) when it held that the reliability of witness identifications does not even need to be considered when there is no police misconduct.

- The New Jersey Supreme Court's decision in *State v. Henderson* and *State v. Chen* chronicled both the "system variables" (variables controlled by law enforcement in identification procedures) and "estimator variables" (variables common to all witnesses that are outside the control of law enforcement) at play in eyewitness identifications.

- The Court noted that 75 percent of the first 250 convicts exonerated by DNA evidence were convicted on the basis of eyewitness identifications and that 36 percent of those exonerated convicts were erroneously identified by more than one eyewitness. The Court also outlined studies suggesting how often witnesses in real criminal cases mistakenly identified innocent people.

- The New Jersey Supreme Court identified a wide variety of reforms. Unsurprisingly, a common factor leading to erroneous identifications is influence of police officers. In response, the Court suggested blind administration and the immediate recording of witness confidence in their identification without any feedback whatsoever.

- In addition to communication by officers themselves, the Court suggested ways of reducing pressure on witnesses to make an identification. Most significant is an instruction to the witness during any identification that the suspect may or may not be there and that the witness does not have to identify anyone positively. Similarly, the Court suggested avoiding multiple viewings of the same suspect as much as possible.

Suggested Reading

Engelhardt, "The Problem with Eyewitness Testimony."

Garrett, *Convicting the Innocent*.

Stuart, *Miranda*.

Questions to Consider

1. Try to recite the *Miranda* rights by heart. How well did you do? Do you think the Supreme Court's decision that suspects have a constitutional right to be informed of their *Miranda* rights helps or hurts the police? Should *Miranda* be overruled?

2. How do you feel about the fact that more than 250 wrongfully convicted people have been definitively exonerated by DNA evidence? What reforms do you think would be most effective in avoiding unlawful convictions? Improving the handling of forensic evidence? Videotaping confessions and encounters with the police? Reforming lineups? Can you think of any other reforms?

Privacy in Electronic Communications

Lecture 9

Most of us have learned not to put anything in an e-mail that we wouldn't be comfortable seeing on the front page of *The New York Times*, but it's still difficult to negotiate the boundaries between what's public and what's private in e-mails and text messages. Given the ease with which a communication intended for one person can be instantly shared with many more—intentionally or not—there's always a danger of electronic communications being judged out of context, which is one of the core definitions of privacy.

The Misinterpretation of E-Mails

- The resurrection of long-forgotten e-mails is becoming a staple of courtroom dramas. In 1997, Judge Thomas Penfield Jackson chose Lawrence Lessig of Harvard Law School to advise him in overseeing the antitrust dispute between the government and Microsoft. When Microsoft challenged Lessig's appointment as a "special master," Netscape officials turned over to the Justice Department an e-mail that Lessig had written to an acquaintance at Netscape in which he joked that he had "sold my soul" by downloading Microsoft's Internet Explorer. The Justice Department, in turn, gave Lessig's e-mail to Microsoft, who claimed he was biased and demanded his resignation.

- In fact, Lessig's e-mail had been quoted out of context. As the full text of the e-mail makes clear, Lessig had downloaded Microsoft's Internet Explorer in order to enter a contest to win a PowerBook. After installing the Explorer, he discovered that his Netscape bookmarks had been erased. In a moment of frustration, he fired off the e-mail to the Netscape acquaintance, describing what had happened and quoting a Jill Sobule song that had been playing on his car stereo: "sold my soul and nothing happened."

- Although a court ultimately required Lessig to step down as special master for technical reasons having nothing to do with his misinterpreted e-mail, he discovered that strangers were left with the impression that the e-mail "proved" that he was biased and forced him to resign. The experience taught Lessig that, in a world in which most electronic footsteps are recorded and all records can be instantly retrieved, it's very easy for sentiments to be wrenched out of their original context.

Privacy in an Electronic Age

- Privacy can be conceived along two dimensions: There is the part of life that can be monitored, or directly observed, and there is the part of life that can be searched because it leaves permanent records. Most of us will never be caught up in lawsuits that lead to subpoenas for our computers or e-mail, but many of us have our e-mail and Internet browsing monitored by our employers—whether we know it or not.

- The Supreme Court's response to the growth of new technologies of monitoring and surveillance has proved to be distressingly passive at every turn. The leading Supreme Court decision about workplace privacy was handed down in 1987, and it gave public employers broad discretion to search the private papers of their employees on the flimsiest of suspicion.

- In *O'Connor v. Ortega*, Dr. Magno Ortega, a psychiatrist at Napa State Hospital, bought a new computer to help train his residents. After a current resident and a former resident implied that Dr. Ortega had sexually harassed them—without using those words—the executive director of the hospital, Dr. Dennis O'Connor, placed Ortega on administrative leave and searched his office without a warrant.

- In a highly intrusive search that evoked the indignities visited on John Wilkes, the investigators combed through Ortega's locked desk drawers and private file cabinets. In his desk drawers, the investigators found and read personal letters from his friends, ex-

wife, and daughter as well as sexually explicit letters from several female friends over many years. Without distinguishing between private and public property, the investigators seized the letters.

- The business manager of the hospital, Dr. Richard Friday, returned to conduct an exploration of his own. He removed from Dr. Ortega's desk drawer a valentine, a suggestive photograph, and an inscribed book of poetry that Ortega had received about 10 years ago from a former resident, Dr. Joyce Sutton. These objects were later produced to embarrass Dr. Sutton when she testified on Ortega's behalf at a state personnel board hearing convened to discredit him.

- Soon after this invasive search, Dr. Ortega filed a complaint against O'Connor and Friday, arguing that they had conducted an unreasonable search and seizure of his office and private papers in an effort to find embarrassing material that might be used against him. The case made its way up to the Supreme Court, where it produced a plurality opinion by Justice Sandra Day O'Connor.

- Justice O'Connor held that the amount of privacy that employees can legitimately expect in different parts of the workplace should vary in accordance with how much privacy they subjectively experience. O'Connor assumed that Ortega had a reasonable expectation of privacy in his desk drawers and file cabinets because he didn't share those areas with any other employees.

- However, held that searches of even the most private areas in Ortega's office didn't require a judicial warrant or probable cause to believe that he was guilty of some specific wrongdoing. The search of Ortega's desk drawer should be upheld, O'Connor said, as long as both the initial justification for the search and its subsequent scope were reasonable. Because Ortega had taken his computer home, she said, the state could legitimately search throughout his office to see whether he had removed any other state property. She then sent the case back to the lower court to determine whether or not the scope of the search was, in fact, reasonably related to its ostensible purposes.

- In 1998, 17 years after the initial search, a jury found that the hospital had conducted an unconstitutional fishing expedition aimed at turning up incriminating evidence against Dr. Ortega rather than a reasonable search to inventory government property. The trial judge ruled that evidence of Dr. Ortega's private papers couldn't be presented at the trial because one of the "sexual harassment" allegations was too vague and the other was too old to have justified such an invasive search.

- Dr. Ortega may have been belatedly vindicated, but the Supreme Court opinion in his case has created an incentive for employers to search the most private areas of the workplace as regularly as possible in order to decrease their employees' expectation of privacy—and this leaves personal e-mail sent over a company server especially vulnerable to exposure.

E-Mail: A Constitutional Puzzle

- Personal e-mail poses something of a constitutional puzzle: On one hand, it sometimes originates from work, which is not a place that the Fourth Amendment reserves for special constitutional protection, and on the other hand, it seems similar to a private letter, which is one of the "papers" and "effects" at the historical core of the Fourth Amendment.

- E-mail, when not encrypted, can be intercepted relatively easily: Rather than being sent directly from computer to computer, the data travels in packets through several intermediaries. Moreover, e-mail can be retrieved from several destinations after it arrives, including the hard drives of the sender or the recipient or the employer's network computer. It's often stored there on backup tapes even after you delete it.

- However, the fact that e-mail can be physically intercepted doesn't mean that it should be treated, for legal purposes, as if it were a postcard. In cases involving e-mail sent from home over commercial Internet providers, some courts now recognize the analogy between sealed letters and personal e-mail.

- In cases involving e-mail sent from work, courts are increasingly holding that employees have very little expectation of privacy—mostly because of the argument that Justice O'Connor endorsed in the *Ortega* case: As long as network administrators have the technical ability to read their employees' e-mail, employees should have no reasonable expectation that their e-mails aren't being read.

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Many of us have our e-mail and Internet browsing monitored by our employers—whether we know it or not.

- Courts have reached similar conclusions in invasion of privacy suits filed against private employers who fired employees after reading their e-mail. The plaintiffs in one of the cases, Bonita Bourke and Rhonda Hall, had been hired to set up an e-mail system for a Nissan dealership. In the course of demonstrating how the system worked, a coworker randomly picked a personal e-mail that Bourke had sent, which turned out to be sexually explicit. The Nissan management proceeded to review all of the messages sent by Bourke and Hall and reprimanded both of them after finding several personal messages that contained sexual banter.

- When Bourke and Hall protested, Hall was fired and Bourke resigned. Bourke then sued, arguing that Nissan had invaded her privacy by reading her e-mail, but the California Court of Appeals rejected her claim in 1993. It concluded that Bourke didn't have a reasonable expectation of privacy in her e-mail because she knew months earlier that Nissan was monitoring e-mail messages.

- The Supreme Court has weighed in only once on the topic of e-mail privacy—in *City of Ontario v. Quon* (2010). Three officers in the Ontario Police Department in California were issued pagers by the department and were later disciplined for using the pagers for private texting while on duty. Before they were given the pagers, which could only send and receive text messages, the officers signed an acknowledgment that they had read and understood the city's computer usage policy, which included the warning that the city might monitor and log network activity with or without notice.

- Once Quon got the pager, he began to send text messages at a rate that exceeded the coverage of the city's plan. Instead of auditing his pager use, which the city was allowed to do, a superior officer got the text transcripts from the service provider, redacted the portions of the texts that were sent while Quon was off duty, and read the rest. This audit indicated that the officer was severely misusing his pager. As a result, he was disciplined.

- Rejecting Quon's challenge, the Supreme Court held that his Fourth Amendment rights weren't violated by the search. The justices focused on whether Quon had notice that the police department would be monitoring his calls. In holding that Quon did have notice, the Court emphasized that Quon's awareness of the police department policy reduced his expectation of privacy.

- In addition to the Constitution, federal wiretap laws give employees some protection for privacy in the workplace. The Wiretap Act limits everyone's ability to record communications in real time or to disclose stored electronic information and forbids anyone from intercepting and recording electronic communication without consent. It also provides for a civil claim against both law enforcement and individuals who violate the act.

- If employers were only permitted to monitor their employees' e-mail after clearly warning the employees in advance to expect monitoring, then surveillance might be tolerated as an intrusive but freely accepted condition of employment. Indeed, the courts

might adopt the following default rule: If the employer doesn't expressly warn employees of the specific invasions of privacy that the company practices and gain their consent, then the material in question can't be invaded. Unfortunately, even when employers promise to respect the privacy of e-mail, courts are upholding their right to break their promises without warning.

- In a 1996 case from Pennsylvania, the Pillsbury Company repeatedly promised its employees that all e-mail would remain confidential and that no employee would be fired based on intercepted e-mail. However, Michael Smyth, a Pillsbury employee, was fired for transmitting "inappropriate and unprofessional comments." Smyth sued, arguing that the company had invaded his right to privacy by firing him, but the court blithely dismissed his claim and concluded that Pillsbury's "interest in preventing inappropriate and unprofessional comments or even illegal activity over its e-mail system outweighs any privacy interest the employee may have in those comments."

- A court that took informational privacy seriously could try to think creatively about how to allow companies to search for evidence of workplace misconduct without exposing all of their workers' private correspondence to public view, even if it happens to be stored rather than destroyed.

- When companies monitor e-mail to investigate violations of workplace rules, perhaps judges should try to resurrect a version of the "mere evidence" rule for cyberspace, allowing only the illegal activity revealed by the search, but not the e-mail messages themselves, to be introduced in court. Perhaps privacy masters could review e-mail to separate public, work-related correspondence, which could be admitted in court, from private correspondence between workers, which could be excluded.

Suggested Reading

Liptak, "Justices Allow Search of Work-Issued Pager."

Schulhofer, *More Essential Than Ever*.

Sorrel, "TigerText Deletes Text Messages from Receiver's Phone."

Questions to Consider

1. Were you surprised to learn that employers are free to monitor texts and e-mails sent from personal accounts? Should e-mail and text messages be considered electronic "effects" and given the same legal protection as old-fashioned letters sent by snail mail?

2. Why is workplace privacy important to you? In your computer use, do you draw a strict distinction between home and work, or do you work from home and engage in personal browsing at work? Is it feasible to carve out zones of privacy at work, or should we assume that everything we do in the workplace can be monitored?

Privacy in Cell Phones and Computers

Lecture 10

The amount of information our cell phones transmit to our cell phone carriers every day is immense, revealing a great deal of information about us. As the number of cell phone users increases and cell phones begin to use GPS technology, carriers will be able to identify their users' locations with increasing precision. In this lecture, you will learn about privacy protections for data stored in cell phones and computers as well as about the ways the Internet is transforming the boundaries between home, work, and school.

Cell Phone and Computer Privacy

- There is currently vigorous litigation over whether law enforcement can request locational data from cell phone carriers without a warrant and without probable cause. In *United States v. Jones*, the Supreme Court held that the police conducted a search when they put a GPS device on the bottom of a car and tracked the suspect's movements for a month. In the wake of that decision, lower courts have disagreed about whether historical cell phone data is protected by the Fourth Amendment.

- Some courts have held that the third-party doctrine does not apply to cell phone information because "a cell phone customer has not 'voluntarily' shared this location information with a cellular provider in any meaningful way." Other courts have held that the third-party doctrine does apply to historical cell phone data and that records of our past movements can be disclosed by our cell phone if the standards of the Stored Communications Act are satisfied.

- However, because many courts are uncomfortable with the level of privacy protection individuals receive under the third-party doctrine, they have been forced to create exceptions that are often legally questionable. The government or private companies will be able to access those records of your movements unless the Supreme

Court reexamines the third-party doctrine, which holds that "an individual has no reasonable expectation of privacy in information voluntary disclosed to third parties."

- If the Fourth Amendment doesn't protect historical cell phone data, then any privacy protection for cell phone users is provided through statutes such as the Stored Communications Act and the Pen Register law—not the Constitution. However, these laws allow the government to obtain cell phone information with much less information than the probable cause that's required by the Fourth Amendment.

- The other way that the government can search your smartphone or computer is in the course of a traffic stop or arrest or an otherwise legal search of your car. However, courts are disagreeing vigorously about how far the police should be able to delve into your smartphone or computer without a valid warrant. Some courts view smartphones and computers as no different than any other physical evidence, which the police can examine without limits to determine whether they're connected to a crime.

- In a California case from 2011, a sheriff watched Gregory Diaz buy drugs from a police informant. After witnessing the purchase, the sheriff arrested Diaz and seized six tabs of Ecstasy, some marijuana, and a cell phone. After interrogating Diaz at the police station, the sheriff went through the text message folder on Diaz's cell phone and saw a message that read "6 4 80." As an officer with an understanding of drug crimes, Fazio recognized this message to mean "six pills of Ecstasy for $80." Fazio confronted Diaz with this information, and he then confessed to buying the drugs.

- The California Supreme Court upheld the reading of the text messages as a valid search incident to arrest. The Court dismissed concerns that cell phones contain so much private information that they shouldn't be treated like other physical items found on a suspect's person. The majority pointed to the lack of evidence in the record "regarding the storage capacity of cell phones" and held that

the defendant could not adequately explain "why the sheer quantity of personal information should be determinative."

- Following the lead of the dissenting judge in this case, other courts have insisted on treating computers and cell phones more like file cabinets than ordinary physical evidence and have insisted that individuals have the same expectation of privacy in their hard drives and cell phones that they have in private papers stored at home.

- *United States v. Comprehensive Drug Testing*, decided by the Ninth Circuit Court of Appeals in 2009, arose out of a federal investigation into the Bay Area Lab Cooperative (BALCO). In response to allegations of steroid use among Major League Baseball players, the Players Association agreed to drug testing for all players. The results of these tests were maintained on an excel spreadsheet stored in computers owned by a company called Comprehensive Drug Testing, Inc.

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As of 2010, there were more than 285 million cell phone accounts in the United States in a population of 300 million people.

- During the federal government's investigation of any wrongdoing by BALCO, authorities learned of 10 players who tested positive for performance-enhancing drugs and obtained a subpoena for all of the records. In executing the warrant, the government seized and reviewed the computerized drug test results for not only the 10 players suspected of wrongdoing, but for hundreds of other players as well.

- The Ninth Circuit ultimately upheld the decisions of three district court judges who found the government's actions to be

unreasonable in varying ways. The court found that the government failed to follow the procedures of *United States v. Tamura*, a 1982 case that outlines segregation procedures to guard against this type of overreach.

- In a concurring opinion joined by four other judges, Judge Alex Kozinski proposed guidelines for protecting privacy when government officials search computers. The proposed requirements set up a workable method for sifting through large amounts of electronically stored data. However, it is not likely that the Supreme Court will adopt them.

Cyberbullying

- The Internet has transformed the boundaries between home, work, and school in many ways. The clearest examples are recent cases involving cyberbullying in which school administrators have attempted to punish students for the content of posts on Myspace and Facebook that were uploaded at home.

- These cases are illuminating because courts have generally been hostile to attempts by school administrators to punish students for their online conduct when it originated from computers outside of school. In those cases, they have adhered to the free speech rationale in a 1969 case, *Tinker v. Des Moines*, which allows punishment of students for on-campus speech, but only when the conduct "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."

- In *Tinker*, the Supreme Court held that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Although not coextensive with the free speech rights of adults in other settings, the *Tinker* case suggests that the First Amendment protects student speech and limits the authority of schools to discipline students for expressive activity that occurs off campus. However, the distinction between on- and off-campus is now being challenged by the Internet.

- In *Tinker*, the Court held that student expression cannot be suppressed unless the speech is likely to cause a substantial disruption with the operation of the school. However, the holding of *Tinker* was limited to on-campus speech. In developing the substantial disruption test, the Court noted that students' free speech rights go beyond the classroom, and in applying the test, the Court looked only to evidence of on-campus disruptions.

- Lower courts have struggled to apply the Supreme Court student speech precedent to the increasing world of online student speech, which has blurred the line between on and off campus. Some lower courts have stretched *Tinker* to apply to off-campus student speech on the Internet and have strained to define the scope of the school's authority.

- In *Snyder v. Blue Mountain School District* (2011), eight judges in the Third Circuit held that the school violated an eighth grader's free speech rights when it disciplined the student for creating a fake Myspace profile of her school principal using her home computer. The court assumed that *Tinker* applied and held that there was no actual or foreseeable substantial disruption. Although careful to avoid adopting a test for when *Tinker* should apply to off-campus speech, the court noted that the student did not "target" the school.

- The Fourth Circuit reached a different result in *Kowalski v. Berkeley County Schools* (2011), which held that speech can be punished when a student's off-campus social activity results in bullying of students in school. The Fourth Circuit concluded that her speech caused the kind of disruption that *Tinker* said could be prevented by administrators. In the eyes of the court, the snowball effect of allowing bullying to go unchecked brought Kowalski's conduct squarely under the school's disciplinary authority.

- The various standards being used by the lower courts to determine when *Tinker* may apply to off-campus speech seem insufficient to protect students' First Amendment rights. Some courts have assumed, without deciding, that *Tinker* applies to off-campus

speech. Other courts have tried to limit the reach of *Tinker* by requiring a nexus between the speech and the school or by asking whether it was reasonably foreseeable that the speech would reach the school.

- Given the great divergence in lower courts' application of *Tinker* to student online speech, it would be helpful for courts to define off-campus speech carefully so that students, schools, and courts understand the boundaries of school authority to suppress student online speech. The problem is that the Internet obfuscates the line between on- and off-campus speech.

- The clearest way to define off-campus speech would be based on the geographical location of the speaker. When a student engages in online speech after school hours and off school property, that speech should be considered off-campus for purposes of the First Amendment. This is complicated by technologies that allow students to read or receive online, off-campus speech from geographical locations distant from the speaker.

- Of course, schools have other ways of controlling access to off-campus speech on school grounds. They can—and many do—ban student cell phone use on-campus and install blocking mechanisms on school computers to prohibit access to nonacademic websites.

- In the most tragic cases, cyberbullying can result in more than hurt feelings—it can result in death. In 2006, 49-year-old Lori Drew created a fake Myspace account under the name "Josh Evans" and started communicating with 13-year-old Megan Meier, who had been friends with Drew's daughter, but after a falling out between the teens, Drew decided to torment her.

- Over the course of several months, Drew and others involved in the hoax gained the trust of Meier through the fictional persona of Josh Evans and hinted at a romantic relationship. As Drew and her accomplices got more information on Meier, they began to use it to humiliate her and to persuade others to harass her online. After

receiving a particularly offensive message, Meier hanged herself in her closet.

- A short time after Meier's death, a neighbor whom Drew had informed about the plot told the Meier family that Josh Evans was not real and that Lori Drew was behind both the profile and the harassment. After local prosecutors failed to bring a criminal case against Drew, the federal government indicted her for violating the Computer Fraud and Abuse Act.

- Although the suicide was a tragedy, the prosecution was a legal stretch. The Computer Fraud and Abuse Act makes it a crime to access a computer without authorization and escalates that crime from a misdemeanor to a felony when unauthorized access is in furtherance of another crime. The case is sad on many levels, but it shows that computer fraud laws are not the best way to deal with cyberbullying.

- Another widely publicized tragedy involving cyberbullying was the trial of Dharun Ravi, who broadcasted his roommate, Tyler Clementi, kissing a man in their dorm room. When Clementi found out, he requested a new roommate, but before school officials could intervene, he committed suicide. Ravi was indicted by a grand jury in New Jersey for invasion of privacy, among other charges, and was found guilty on all 15 counts.

- Thus far, there has been only one lawsuit based on schools using webcams to spy on students outside of school. In 2009, Pennsylvania's Lower Merion School District instituted a policy that provided every student at Lower Merion High School with a laptop equipped with a webcam that could be activated remotely by the school without the knowledge of users. The school was sued for invasion of privacy and for violating wiretapping statutes.

Suggested Reading

Kravets, "School District Allegedly Snapped Thousands of Student Webcam Spy Pics."

Parker, "The Story of a Suicide."

Zetter, "Judge Acquits Lori Drew in Cyberbullying Case."

Questions to Consider

1. The constitutional status of smartphones and computers is wide open at the moment. Do you think TSA agents, customs officials, and the police should be able to search your smartphone or computer hard drive without limits at the border in order to protect public safety? If not, are you persuaded by Judge Kozinski's attempt to limit computer searches, or would you prefer another approach?

2. Have your children, young relatives, or friends encountered cyberbullying or free speech controversies at school or on Facebook? Describe what happened and who was at fault. Do you think schools should only hold students responsible for speech posted online while they're at school, or should students assume that anything they post online can be punished by school administrators?

The Internet and the End of Forgetting

Lecture 11

According to a survey by Microsoft, 75 percent of U.S. recruiters and human-resource professionals report that their companies require them to do online research about candidates, and many use a range of sites when scrutinizing applicants. Furthermore, 70 percent of U.S. recruiters report that they have rejected candidates because of information found online. This lecture will discuss the ways that the Internet is threatening our ability to reinvent ourselves and escape our past—as well as some technologies that we can use to regain control over the face that we present to the world.

Internet Privacy Invasions

- In 2006, Stacy Snyder, then a 25-year-old teacher in training at Conestoga Valley High School in Pennsylvania, posted a photo on her Myspace page that showed her at a party wearing a pirate hat and drinking from a plastic cup, with the caption "drunken pirate." After discovering the page, her supervisor at the high school told her that the photo was "unprofessional," and the dean of Millersville University School of Education, where Snyder was enrolled, said she was promoting drinking in virtual view of her underage students.

- As a result, days before Snyder's scheduled graduation, the university denied her a teaching degree. Snyder sued, arguing that the university had violated her First Amendment rights by penalizing her for her (perfectly legal) after-hours behavior. However, in 2008, a federal district judge rejected the claim, saying that because Snyder was a public employee whose photo related to matters of private rather than public interest, her "drunken pirate" post was not protected speech.

- Technological advances, of course, have often presented new threats to privacy. In 1890, in perhaps the most famous article on privacy

ever written, Samuel Warren and Louis Brandeis complained that because of new technology—such as the Kodak camera and the tabloid press—"gossip is no longer the resource of the idle and of the vicious but has become a trade."

- However, the mild society gossip of the Gilded Age pales before the volume of revelations contained in the photos, videos, and chatter on social media sites and elsewhere across the Internet. Facebook, which surpassed Myspace in 2008 as the largest social networking site, had more than 900 million members in 2012. There are more than 100 million registered Twitter users, and the Library of Congress announced that it will be acquiring—and permanently storing—the entire archive of public Twitter posts since 2006.

Old-Fashioned Gossip versus Cyberspace Gossip

- Gossip that in Brandeis and Warren's day might have taken place in a drawing room is now recorded on Facebook and Google and can be retrieved years later from any location. In certain circles today it is not uncommon for prospective romantic partners, before going out on dates, to perform background checks on each other, scouring the Internet for as much personal information as possible. Instead of being restricted to informal gossip networks, the most intimate personal information is often recorded indelibly and can be retrieved with chilling efficiency by strangers around the globe.

- Oral gossip is a way of enforcing communal norms while still respecting privacy. When neighbors gossip about one another's intimate activities, those who behave badly will soon feel the indirect effects of social disapproval. The wrongdoers can then correct their misbehavior without feeling that their public faces have been assaulted, and because all of the relevant parties know one another well based on close personal observation, individual transgressions can be weighed against the broader picture of an individual's personality.

- Cyberspace, however, has blurred the distinction between oral and written gossip by recording and publishing the kind of private

information that used to be exchanged around the water cooler. Unlike oral gossip, Internet gossip is difficult to answer because its potential audience is anonymous and unbounded. Furthermore, when the gossip is archived, it can come back to haunt.

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A challenge confronting millions of people around the world is how best to live our lives in a world where the Internet records everything and forgets nothing.

- In Brandeis's day—and until recently, in ours—you had to be a celebrity to be gossiped about in public. Today, all of us are learning to expect the scrutiny that used to be reserved for the famous and the infamous. The Internet also allows for unprecedented voyeurism, exhibitionism, and inadvertent indiscretion,

- We are only beginning to understand the costs of an age in which so much of what we say, and of what others say about us, goes into our permanent—and public—digital files. The fact that the Internet never seems to forget is threatening, at an almost existential level, our ability to control our identities, to preserve the option of reinventing ourselves and starting anew, and to overcome our checkered pasts. In traditional societies, where missteps are observed but not necessarily recorded, the limits of human memory ensure that people's sins are eventually forgotten.

- All around the world, political leaders, scholars, and citizens are searching for responses to the challenge of preserving control of our identities in a digital world that never forgets. In the United States, a group of technologists, legal scholars, and cyberthinkers are exploring nonlegal ways of re-creating the possibility of digital forgetting. These approaches share the common goal of

reconstructing a form of control over our identities—the ability to reinvent ourselves, to escape our pasts, and to improve the selves that we present to the world.

How to Protect Yourself

- Those who think that their online reputations have been unfairly tarnished by an isolated incident or two now have a practical option: consulting a firm like Reputation.com, which promises to clean up your online image. Reputation.com is the most successful of the handful of reputation-related start-ups that have been growing rapidly after the privacy concerns raised by Facebook and Google. For a fee, the company will monitor your online reputation, contacting websites individually and asking them to take down offending items.

- In addition, with the help of the kind of search-optimization technology that businesses use to raise their Google profiles, Reputation.com can bombard the web with positive or neutral information about its customers, either creating new web pages or by multiplying links to existing ones to ensure they show up at the top of any Google search. By automatically raising the Google ranks of the positive links, Reputation.com pushes the negative links to the back pages of a Google search, where they're harder to find.

- It is possible that digital-storage devices could be programmed to delete photos or blog posts or other data that have reached their expiration dates. In fact, there are already privacy applications that offer disappearing data. An app called TigerText allows text-message senders to set a time limit—from one minute to 30 days—after which the text disappears from the company's servers on which it is stored and, therefore, from the senders' and recipients' phones.

- Expiration dates could be implemented more broadly in various ways. Researchers at the University of Washington, for example, are developing a technology called Vanish that makes electronic data "self-destruct" after a specified period of time. Instead of relying on Google, Facebook, or Hotmail to delete the data that is stored "in

the cloud"—in other words, on their distributed servers—Vanish encrypts the data and then "shatters" the encryption key. To read the data, your computer has to put the pieces of the key back together, but they "erode" or "rust" as time passes, and after a certain point, the document can no longer be read.

- Facebook, if it wanted to, could implement expiration dates on its own platform, making our data disappear after a certain amount of time—unless a user specified that he or she wanted it to linger forever. It might be a more welcome option for Facebook to encourage the development of Vanish-style apps that would allow individual users who are concerned about privacy to make their own data disappear without imposing the default on all Facebook users. So far, however, Mark Zuckerberg, Facebook's CEO, has been moving in the opposite direction—toward transparency rather than privacy.

- The future of our online identities and reputations will ultimately be shaped not just by laws and technologies but also by changing social norms, and norms are already developing to re-create off-the-record spaces in public—with no photos, Twitter posts, or blogging allowed.

- However, what happens when people transgress those norms, using Twitter or tagging photos in ways that cause people serious embarrassment? Imagine a world in which new norms develop that make it easier for people to forgive and forget one another's digital sins. That kind of social norm may be harder to develop. In fact, research in behavioral psychology suggests that people pay more attention to bad information than to good.

Privacy as a Form of Control

- This idea of privacy as a form of control is echoed by many privacy scholars, but it seems too harsh to say that if people like Stacy Snyder don't use their privacy settings responsibly, they have to live forever with the consequences.

- Privacy protects us from being unfairly judged out of context on the basis of snippets of private information that have been exposed against our will, but we can be just as unfairly judged out of context on the basis of snippets of public information that we have unwisely chosen to reveal to the wrong audience.

- Moreover, the narrow focus on privacy as a form of control misses what really worries people on the Internet today. What people seem to want is not simply control over their privacy settings—they want control over their online reputations. However, the idea that any of us can control our reputations is, of course, an unrealistic fantasy.

- The truth is we can't possibly control what others say or know or think about us in a world of Facebook and Google—nor can we realistically demand that others give us the deference and respect to which we think we're entitled. However, if we can't control what others think or say or view about us, we can control our own reaction to photos, videos, blogs, and Twitter posts that we feel unfairly represent us.

- A recent study suggests that people on Facebook and other social networking sites express their real personalities, despite the widely held assumption that people try online to express an enhanced or idealized impression of themselves. Samuel Gosling, a psychology professor who conducted the study, is optimistic about the implications of his study for the possibility of digital forgiveness. He acknowledged that social technologies are forcing us to merge identities that used to be separate; we can no longer have segmented selves: "a home or family self, a friend self, a leisure self, a work self."

- Perhaps society will become more forgiving of drunken Facebook pictures in the way Gosling expects it might, and some may welcome the end of the segmented self on the grounds that it will discourage bad behavior and hypocrisy. Opponents of the segmented self have adopted a unified vision of human personality, which views social masks as a way of misrepresenting the true self.

- However, as the sociologist Erving Goffman argued in the 1960s, this take on personality is simplistic and misleading. Instead of behaving in a way that is consistent with a single character, people reveal different parts of themselves in different contexts.

- Goffman also maintained that individuals, like actors in a theater, need backstage areas where they can let down their public masks, tell dirty jokes, collect themselves, and relieve the tensions that are an inevitable part of public performance. In the new economy of information exchange, white-collar workers are increasingly forced to work under constant surveillance.

- A humane society values privacy because it allows people to cultivate different aspects of their personalities in different contexts, and at the moment, the enforced merging of identities that used to be separate is leaving many casualties in its wake.

- Our character, ultimately, can't be judged by strangers on the basis of our Facebook or Google profiles; it can be judged by only those who know us and have time to evaluate our strengths and weaknesses, face-to-face and in context, with insight and understanding. In the meantime, as all of us stumble over the challenges of living in a world without forgetting, we need to learn new forms of empathy, new ways of defining ourselves without reference to what others say about us, and new ways of forgiving one another for the digital trails that will follow us forever.

Suggested Reading

Borges, "Funes, the Memorious."

Mayer-Schönberger, *Delete*.

Rosen, "The Web Means the End of Forgetting."

Questions to Consider

1. Discuss the case of Stacy Snyder, the young teacher in training who was fired after she posted a silly photo of herself on Myspace—drinking from a plastic cup and wearing a pirate's hat—with the caption "drunken pirate." Do you think it was unfair for her to lose her job and any chance of becoming a teacher, or should she be held accountable for inappropriate behavior?

2. Have you ever suffered from the problem of escaping your online past? Is there something you've done that appears online that you wish you could remove? As society struggles with the challenge of digital forgetting, do you think we will eventually become more forgiving? Is there such a thing as a "virtual global community," or is that idea an oxymoron?

Follow-Me Advertising Online

Lecture 12

In this lecture, you will learn about how the advertising model of the Internet is transforming privacy and what you can do to protect yourself. As personalization shapes not only the ads we see and the news we read, but also the Google search results we receive, the possibility of not only shared values but a shared reality will become increasingly elusive. It's true that there may be benefits to this filtering—we may never be annoyed by ads and information that don't reflect our existing preferences and desires. However, there are costs to the shattering of common cultural experiences.

Facebook Beacon

- In 2007, Facebook deployed a new targeted advertising program called Facebook Beacon, which was based on web cookies—pieces of computer code that make it possible for websites to record what you browse, click, and buy. Forty-four companies that had partnered with Facebook—including *The New York Times*, Blockbuster Video, and Yelp—kept track of what individual Facebook users bought and browsed online and reported the activity back to Facebook.

- Facebook stored the information in its servers and used it to send users targeted ads. It also gave users the option of broadcasting their purchases on their Facebook profile pages. However, users had to tell Facebook if they didn't want to broadcast their purchases to the world. Those who didn't notice the Facebook update about Beacon found their purchases broadcast without their knowledge or consent.

- Many users felt alarmed when they found out what kind of information was being shared. The partnership with Blockbuster meant that information about the video purchases of Facebook users was broadcast in real time. Some commentators argued that this troubling practice violated the Video Privacy Protection Act, a federal law prohibiting video companies from divulging customer

information without informed written consent. Because of the backlash provoked by the Beacon feature, Facebook was forced to turn Beacon into an "opt-in" feature and promised not to store information about users' online activities.

Facebook is a social media website that is one of the top five Internet sites. The other four are Google, Yahoo, YouTube, and Microsoft Live.

Target Corporation

- As a large retailer, Target can assemble enormous troves of data about the customers who frequent its stores and website—including names, addresses, and credit card information—and purchasing habits. Through surveys or by purchasing data from so-called data brokers, Target's database can include information about your marital status, ethnicity, and estimated income.

- Target can analyze this information cross-sectionally to identify purchasing habits across its customers. Once it has developed its behavioral models, however, it can use all the different variables of personal data it has about you to predict your preferences and actions as an individual.

- One thing Target has learned is that people don't like to be shown exactly how much Target knows about them, so Target has developed sophisticated ways to hide what it knows from its customers. When Target wants to market to you based on your data, it often uses techniques to mix in targeted products with decoy products that it knows you won't buy but will preserve the illusion of randomness.

Cybercrime and Cyberespionage

- A common refrain among the data brokers and their customers is that even if they can develop powerful profiles of you and predictive models of your future behavior, you shouldn't worry because all they want to do is market products to you. However, besides the chance that a program like Facebook Beacon or Target's marketing could reveal private or sensitive information about you to others, there's also a much greater likelihood that these companies can't be very good stewards of data in today's world of hacking and data breaches.

- Cybercrime and cyberespionage are presenting increasing threats to the integrity of electronic data. Large and sophisticated criminal syndicates have been formed to steal sensitive information.

- As even the most sophisticated and technologically savvy companies begin to experience data breaches, we are entering a world of here-today, gone-tomorrow privacy. Whether the company has obtained information from you, from a data broker, or from predictive analysis, there's no guarantee that it won't end up in the hands of someone who will use it recklessly or maliciously.

Real-Time Bidding

- There's another cost to the new world of targeted advertising: It ensures that we're living online in increasingly different worlds. A technology called real-time bidding is transforming advertising, politics, and the way we live online. In a real-time bidding auction, the moment we visit a particular web page, that visit can be auctioned off to the highest bidding advertiser—based on characteristics like our previous online behavior, where we are at any particular moment, where we live, and whose behavior we resemble.

- One of the leading data exchanges that makes real-time bidding possible is BlueKai. Working with advertising exchanges like Google's DoubleClick and targeting companies like Adnetik, BlueKai helps advertisers decide how much to bid on the right to send ads to individual consumers by deploying more than 30,000 market segments that it uses to define people.

- In 2012, Google expanded its ability to use real-time bidding by changing its privacy policy to allow the company to combine our search histories on YouTube and Google and to send us targeted ads as a result. That same year, Facebook announced that it would introduce real-time bidding through a new service called the Facebook Exchange, allowing advertisers to send Facebook users who have searched for trips to Spain, for example, ads and promotions for Spanish hotels. In addition, real-time bidding allows companies to send consumers different discounts based on their perceived spending power.

- By sorting all of us into different categories defined by our browsing habits and predicted spending power, companies like BlueKai ensure that people in the various segments are increasingly living in different worlds. As online personalization becomes increasingly ubiquitous, our consumer profiles may come to define us in all of our interactions, both online and offline, so that we are presented with different prices at the mall or different news stories and campaign ads on our smartphones—based on a hidden auction system that we're unable to alter or control.

- This hints at the darker side of the online personalization that is delighting us on our iPhones and iPads. A world where Google tells us what we should be doing next is a world where we inhabit a universe of one, an invisible universe that we never chose to enter and from which there's no exit. From the perspective of companies like Google and BlueKai, you are not the consumer—you are the product, being sold to companies bidding for the opportunity to send you ads and other personalized content. Some people, inevitably, are considered much more valuable products than others.

Data-Mining Methods

- Data-mining methods can be grouped into four buckets: cookies, spyware, deep packet inspection, and direct collection. Cookies are identifying pieces of data that a website can embed on a user's hard drive. They tag the user so that any time the user goes to a website or takes another action specified by the cookie, the creator of the cookie

is notified. Because cookies can be given unique identifiers, they can be used to let websites track the activities of an individual user.

- Often, behavioral advertisers use networks of websites to track users' activities across those websites and develop rich profiles of the user of a given computer or device. Based on what information is gleaned about you, the advertiser will serve you with targeted content any time you access a website on the network.

- Cookie-based data mining itself generally does not reveal personally identifying information, but to the extent that the user reveals this kind of information in his or her online activities on the network, it is possible to cross-reference that information with cookie-derived data. If the cookie-derived data is sufficient, the individualized picture of the user may be so accurate that it can identify the user to others who are aware of his or her habits or preferences.

- Spyware is software that is installed on a device for the purpose of tracking all the data the device transmits and receives. While it is illegal to place spyware on a user's computer surreptitiously, a user who clicks through a user agreement without reading it may be consenting to downloading spyware.

- Deep packet inspection is performed by Internet service providers, who have installed devices in their network infrastructures to examine all the data going to and from their users' devices. This technique can be used to compile all sorts of data, which is often sold to data brokers. It is virtually impossible to track or avoid deep packet inspection and, especially, to know what specific data is being captured.

- Direct collection of data involves the data collected at and by a single website, such as Facebook or Netflix. Sometimes, the data is aggregated in order to improve the user experience—for example, when Netflix suggests movies based on a user's expressed preferences. At other times, however, the data is aggregated for targeted advertising. In still other circumstances, the data can be

transmitted to third parties, which is when the user's perspective of how the data is used may become obscured.

Costs of Data Mining

- There are four main concerns posed by data mining: eliminating users' ability to shield intimate and personal details of their lives from the view of profilers, the potential for public disclosure of details that a user expected to remain private, identity theft, and the potential for users to suffer adverse consequences when entities make decisions based on their profiles.

- The first concern is that merely by using the Internet, users are losing control over the details of their private lives. Because of aggregation, these details are not just the ones that the user chooses to reveal to a particular website, but other details that can be pieced together from accumulated information. Although this loss of control is inherently distressing, for most people, the far more disturbing consequence is the potential that private information that has been made available to a website or uncovered by data mining and aggregation can become public.

- Given that so many of the data breaches that lead to disclosure are perpetrated by identity-theft rings, we should also be concerned with the potential of data mining to facilitate these attacks. It has been predicted that people and companies will seek behavioral profiles of people in order to evaluate them in many ways, including for health insurance and lending purposes. Retailers are also likely to use behavioral data to engage in differential pricing of products for consumers based on their profiles.

Regulation of Internet Privacy

- The FTC has called upon Congress to give consumers a right to complete control over their web browsing data, sometimes referred to as "Do Not Track." Bills have been introduced in both houses of Congress to give the FTC authority to make and enforce regulations on Do Not Track, but the proposal has spurred some companies to take voluntary steps toward compliance.

- Many web browsers have developed tools that tell websites they are accessing that the user does not want to be tracked. In addition, the advertising industry has moved to create an icon that will be embedded in targeted advertisements and will allow users to see how the ad was targeted to them and opt out of such targeted advertising.

- In addition, the advertising industry has pledged to oppose the use of behavioral profiling for objectionable purposes, such as determining creditworthiness or insurance coverage, and has pledged to work with the web browser companies in deploying the Do Not Track feature. It is important to note, however, that the data brokers, as opposed to the online advertisers, have not yet signed on to Do Not Track.

- Luckily, there are many technological options available for responsible Internet users who want to protect themselves against some of the negative consequences of data mining. The bottom line is that you can protect yourself if you are willing to take the time to do so and put up with a few inconveniences.

- For example, you can disable cookies in your web browser or set your browser to inform you each time a company wants to set a cookie so that you can only approve cookies from companies you trust. However, so many websites have built their whole architectures around cookies that blocking them can lead to errors. A related option is to purchase antispyware software like Ad-Aware, which can be used to identify and get rid of cookies and spyware used to track your online activities.

Suggested Reading

Duhigg, "How Companies Learn Your Secrets."

Singer, "When the Privacy Button Is Already Pressed."

Questions to Consider

1. Have you ever received online advertisements that you think violate your privacy or inaccurately reflect your tastes and preferences?

2. What are the social costs of living in a "filter bubble," where our online experiences are increasingly targeted to us based on predictions about our interests and purchases? How do you feel about receiving different news articles, entertainment, and discounts based on how valuable advertisers think you are to them?

Privacy and the Body

Lecture 13

At the beginning of the 21st century, the most hotly contested privacy questions in American courts involve the constitutional right to personal autonomy. *Roe v. Wade* is an inspiration for some and a cautionary tale for others about the promises and pitfalls of aggressive judicial protections for personal autonomy. Although Supreme Court justices acknowledge that the Constitution protects privacy in some form, there is broad disagreement about what kind of privacy the Constitution protects. In this lecture, you will learn about the origins and expansions of the constitutional right to privacy.

Griswold v. Connecticut

- The constitutional right to privacy that the Supreme Court ultimately invoked in *Roe v. Wade* was developed almost a decade earlier in *Griswold v. Connecticut*, which struck down Connecticut's ban on the use of contraceptives in 1965. However, that case reflected the culmination of decades of political activism against state bans on contraceptive use that dated back to the 19th century.

- Passed by Congress and the states in the 1870s at the behest of the 19th-century moralist Anthony Comstock, the federal and state anticontraceptives laws were defeated not primarily by the courts, but by the political agitation of activists such as Margaret Sanger. As in the case of sterilization laws, contraceptive bans were struck down by courts only after popular support for them had deteriorated.

- The 1873 federal Comstock Act forbade interstate trading in obscene materials, including "any article whatever for the prevention of conception, or for causing unlawful abortion." During the following 15 years, 22 states passed laws modeled on the federal language, although some of the state laws went even further.

- Sanger crusaded vigorously for the legislative repeal or judicial invalidation of contraceptive laws, but initially, she had limited success. By the 1930s, however, popular opinion about contraceptives had changed dramatically. It was hardly an act of very aggressive judicial unilateralism, therefore, when the U.S. Court of Appeals in New York, in the *United States v. One Package* case in 1936, largely struck down the 1873 federal Comstock Act.

- During the baby boom of the 1950s, support for family planning became overwhelming: National fertility studies between 1955 and 1960 indicated that 81 percent of the wives surveyed had used some form of contraception. By 1965, Connecticut was the only state that prohibited the use of contraceptives by married couples.

- The Supreme Court, therefore, was forcing a single state outlier to comply with an overwhelming national consensus when it struck down Connecticut's unique 1879 law in *Griswold v. Connecticut* (1965). The plaintiffs in *Griswold* challenged a Connecticut law that imposed fines or prison terms on individuals who used contraceptives or abetted their use. Not only could women be criminally penalized for using contraception, but any doctor or pharmacist who abetted the misdeed could be punished as well.

- The Court struck down the law as an unconstitutional infringement of married couple's right to privacy. The Court famously defined this right—which is not enumerated in the Constitution—as emanating from the "penumbras, formed by emanations" from specific guarantees in the Bill of Rights. These various penumbras created a "zone of privacy" into which the state cannot enter.

- The Court found that these emanations of the different rights in the Constitution created a penumbral zone of privacy that forbade the state from criminalizing contraception for married couples. Notably, the Court did not expressly emphasize the liberty interest of a woman's bodily autonomy in its decision. Rather, the Court stressed the privacy inherent to the "sacred" marital relationship and the importance of keeping the state out of the "marital bedroom."

- The positive reaction to the *Griswold* decision shows the degree to which the Court had ratified a popular consensus about the unconstitutionality of contraceptive restrictions that had crystallized in Congress as well. In 1967, Congress required the provision of family planning services under two federal programs, and by the end of that year, 47 states had endorsed family planning. Far from having precipitated a social revolution, the Supreme Court was merely ratifying it in conjunction with Congress, the president, and the states.

- However, while *Griswold* struck down contraception bans as infringing the right of marital privacy, in 1972, the Court struck down a Massachusetts law that forbade prescribing contraception to unmarried individuals in a case called *Eisenstadt v. Baird*. In the process, the case extended the privacy right in *Griswold* into an even more abstract right of individual autonomy.

Roe v. Wade

- Unlike *Griswold* and *Eisenstadt*, where the appellants had been doctors or other distributors of contraception, the appellants in *Roe v. Wade* (1973) were a physician and a woman who had an unplanned pregnancy in Texas. They challenged a Texas law that forbade all abortions except those necessary to save the life of the mother.

- In striking down the law, the Court rejected the position of Texas, which had argued that life begins at conception and that the state has a compelling interest in protecting human life from the moment of conception that outweighed the mother's interest. The Court found that fetuses are not "persons" as understood by the Fourteenth Amendment.

- At the time, *Roe* was criticized not only by conservatives, but also by liberal constitutional scholars, such as John Hart Ely and Alexander Bickel, who found the Court's abstractions about the right to privacy unsupported by constitutional text, history, tradition, or precedent.

- The most controversial part of the *Roe* opinion was not its derivation of a fundamental right to abortion but its almost legislative specifications about the boundaries of the new right. In his opinion for the Court, Justice Blackmun said that the Constitution required an intricate set of guidelines for state regulations: Abortions had to be available to women during the first trimester, could be restricted only to protect the mother's health in the second trimester, and could be restricted to protect the fetus's interests only in the third trimester.

- Instead of inviting state legislatures to balance the interests of the mother and the fetus, as the lower courts had done, the Court imposed a scheme of regulation by judicial fiat, and it did so without asking for guidance from the states or Congress.

- Although no one can be sure how quickly abortion laws would have been liberalized across the country if the Supreme Court had acted more modestly, the fact that more than half the country since 1973 has consistently opposed restrictions on abortion during the first three months of pregnancy suggests that the reform movement could not have stalled for long without provoking a national reaction.

- While the *Roe* framework largely dovetailed with majority opinion, many scholars believe that the Court created a polarizing backlash by stepping into the abortion debate prematurely rather than letting public consensus about abortion play out in the political arena. While the Court struck down the Connecticut contraception ban in *Griswold*, contraception was legal in 46 states, leaving Connecticut an outlier that the Court brought into line with national majority opinion.

- By contrast, in 1967, 49 states and the District of Columbia classified abortion as a felony. While these restrictive laws were arguably doomed to fall victim to the changing sensibilities of the sexual revolution, many believe that if abortion legislation had been left to the states, within a decade or two, most states would have enacted abortion laws roughly similar to what the Court described in *Roe*. The use of democratic political processes might have defused

some of the intense polarization on the issue, but the perception by opponents of the decision that the justices imposed their values on the country by judicial fiat arguably exacerbated the conflict.

Casey v. Planned Parenthood

- In *Casey v. Planned Parenthood*, the Court voted five to four in 1992 to reaffirm the central holding of *Roe*. In 1992, strong majorities continued to support laws requiring women seeking abortions to wait 24 hours, laws requiring doctors to inform patients about alternatives to abortion, laws requiring women under the age of 18 to get parental consent for any abortion, and laws requiring that husbands be notified if their wives seek abortions.

- As if acknowledging this persistent public support, the Court upheld all of these restrictions in *Casey*, with the exception of spousal notification laws. At the same time, the Court reaffirmed the core of *Roe*—the holding that abortion may not be prohibited before fetal viability—a principle that, in the years since *Roe*, commanded even stronger national support. As an exercise in judicial representation, the Court in the *Casey* decision managed to reflect the complexity of public opinion about abortion even more precisely than Congress itself.

- The divided and fractured opinion did little to diminish the polarization of the issue: Opponents of abortion were discouraged by the Court's refusal to overturn *Roe* while the prochoice camp was disheartened by the Court's upholding of almost every restriction imposed by the Pennsylvania law.

- In addition to abandoning the trimester framework and substituting the "undue burden standard," *Casey* was notable in two other ways. First, the Court specifically mentioned a liberty interest in bodily autonomy and integrity that it had not in *Roe*, citing cases addressing the liberty interest involved in refusing unwanted medical treatment.

- Second, the Court explicitly conceived of restrictions on abortion as a form of gender discrimination. In *Roe*, the idea of abortion as an issue of women's rights was not the predominant theme. Justice Blackmun emphasized that the individual best equipped to make the decision regarding an abortion was the woman's physician—not the woman herself. In *Casey*, the Court acknowledged abortion specifically as a women's issue.

- Other language in *Casey* suggested that the restrictions on abortion might violate women's right to equality by denying the right to participate in the workforce on equal terms with men and forcing them into an unwanted occupation—namely that of mother and caregiver. By linking the right to choose more closely with the right to equality enumerated in the text of the Constitution, the *Casey* decision established a firmer constitutional foundation.

- Nevertheless, the Court struck down the Partial-Birth Abortion Ban Act, which Congress passed in 2003. The act banned abortions in which the fetus was delivered headfirst until the entire head was outside the mother's body or delivered feetfirst until the fetus's legs and trunk up to the navel were outside the mother's body.

Gonzales v. Carhart

- In *Gonzales v. Carhart* (2007), the Court found that Congress had a legitimate concern that certain abortion procedures might appear especially similar to infanticide and have "the power to devalue human life." The fact that the Partial-Birth Abortion Ban Act did not have an exception for the health of the mother did not render it unconstitutional.

- By striking down the act, Justice Kennedy, who wrote the majority opinion, believed he was maintaining the distinction he had emphasized when he voted to uphold *Roe* in 1992: Early-term abortions had to be protected, but late-term abortions could be restricted.

- *Gonzales* was especially notable for one aspect of Justice Ginsburg's dissent. Ginsburg emphasized the gender issues first raised in *Casey*. Restrictions on abortions "center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature," she wrote. This cast abortion rights as an equal protection issue for the first time.

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Five U.S. states require that a woman be provided with the opportunity to view an ultrasound image prior to having an abortion.

Mandatory Ultrasound Laws

- Some state laws require doctors to perform an ultrasound on pregnant women before they have an abortion and to make the fetal heartbeat audible to the woman. A Texas law, the Woman's Right to Know Act, included these provisions but allowed the woman to decline to see the sonogram image or hear the heartbeat. The Fifth Circuit upheld the law, which permitted doctors to share "truthful, nonmisleading, and relevant disclosures" about abortion procedures.

- Many doctors opposed the law as medically unnecessary and as a violation of their First Amendment freedom of speech. The circuit court rejected these arguments and found that the requirements were valid measures to promote the fetus's life and to protect women from "devastating psychological consequences" that might arise if she had an abortion without full knowledge of the procedure.

- The Oklahoma Supreme Court struck down a similar law requiring women seeking an abortion to have an ultrasound image placed in front of them and to listen to a detailed description of the

fetus. Despite the conflicting outcomes and national controversy, mandatory ultrasound laws are relatively common.

Suggested Reading

Garrow, *Liberty and Sexuality*.

Rosen, C., *Preaching Eugenics*.

Rosen, J., "The Day after Roe."

Tribe, *Abortion.*

Questions to Consider

1. When *Roe v. Wade* was decided in 1973, it was criticized by some liberal constitutional scholars for not grounding the right to privacy in any specific constitutional provision. As a constitutional matter, do you think *Roe* was correctly decided, or should the states have been allowed to continue to liberalize abortion laws on their own, without interference or help from the courts?

2. What do you think, as a policy matter, about mandatory ultrasound laws that try to dissuade women from exercising their constitutional right to choose abortion by showing them images of the fetus? Regardless of your answer, do you believe that these laws are unconstitutional?

The Right to Die

Lecture 14

As if chastened by the reaction to the abortion decision, the Supreme Court behaved circumspectly in a series of important privacy cases involving the right to die. As the American population ages and faces rising health care costs, cases in which doctors seek to terminate treatment in spite of patients' wishes to the contrary may become increasingly common. In this lecture, you will learn about right-to-die cases as well as practical questions and future issues involving the end of life.

The Story of Terri Schiavo

- In March 2005, for the first time in history, Congress ordered the federal courts to reexamine a case involving the right to die. The case involved Terri Schiavo, a young woman who collapsed from a heart attack in 1990 and whose brain suffered a severe oxygen loss that left her in a coma. In 1998, after winning a malpractice suit against the doctors who failed to diagnose Terri's eating disorder, her husband, Michael, argued in court that she would have wanted her feeding tube to be removed. Her parents responded that Terri would have wanted to stay alive, insisting that Michael, who had become engaged to another woman, was not a reliable representative of Terri's wishes.

- A state judge agreed with Michael Schiavo that Terri would have wanted to refuse treatment, based on her statements to her husband and relatives. Two other state courts affirmed the decision, and the judge ordered the tube to be removed in 2001. After further legal wrangling, the Florida legislature passed "Terri's Law," which authorized the Florida governor to issue a "one-time stay" of a court order in Terri's case. Nearly a year later, the Florida Supreme Court unanimously struck down Terri's Law as an unconstitutional attempt by the legislature to delegate judicial powers to the executive branch. Another year of legal fights ensued, and in

February 2005, the state judge once again ordered Terri's feeding tube to be removed.

- At this point, the U.S. Congress intervened. Terri Schiavo received a subpoena ordering her to appear before the U.S. House of Representatives—with her feeding tube intact. The Senate delayed its Easter recess and passed a private relief bill giving Terri Schiavo's parents the right to contest her constitutional rights in federal court. Early the next morning, having suspended its rules, the House passed the bill, and the president returned from Easter vacation to sign it.

- Despite this extraordinary intervention, the federal courts authorized to review Schiavo's case wasted no time in upholding the state judge's original order. A federal district court judge refused to order the reinsertion of the tube, and over the next few days, a federal appellate court and the U.S. Supreme Court refused to intervene. On March 31, 2005, Terri Schiavo died.

- By and large, state and federal judges performed well by following existing law rather than embracing novel constitutional arguments. The performance of Congress was less impressive. In the midnight House debate over the private relief bill for Schiavo's parents, there were frequent references to Terri Schiavo's "constitutional right to life"—but there were no serious efforts to define the contours of that right or to make arguments about why it was not adequately protected by the judicial procedures that the Florida state courts had followed.

- To the degree that Congress was attempting to challenge the constitutional vision of the courts, moreover, its competing vision did not seem to be embraced by the American people. After Schiavo's death, an overwhelming 82 percent of Americans in a CBS news poll said that they disapproved of the decision by Congress and the president to intervene in the case.

- The reaction to the Schiavo case reveals something odd and unexpected about American judicial politics in the early 21st century.

Conservative critics of the Schiavo ruling charged that unelected activist judges were thwarting the will of the people, but in fact, the critics had it exactly backward. In our new, topsy-turvy world, it was the elected representatives who were thwarting the will of the people, which was being channeled instead by unelected judges.

Right-to-Die Cases

- The first right-to-die case made its way to the Supreme Court in 1990 in *Cruzan v. Director, Missouri Department of Health*. Nancy Cruzan was a young woman whose car spun out of control on a deserted country road one winter night in 1983. She was found lying in a ditch with no cardiac or respiratory function, but paramedics managed to revive her. She was in a coma for three weeks and then fell into a "persistent vegetative state," which meant that she retained certain motor reflexes and involuntary functions but had no cognitive function. A feeding tube was inserted into her stomach with her family's consent, but after it was clear that Cruzan had no hope of recovery, they sought to remove the tube and let her die of dehydration.

- Cruzan did not have a living will or any written directive expressing her wishes, and the hospital refused to remove the tube unless directed to do so by a court. Ultimately, the state Supreme Court of Missouri said that absent "clear and convincing evidence" that Cruzan would have wanted to have the tube removed, her parents could not make that choice for her.

- Seven years after her accident, the U.S. Supreme Court upheld this finding. It intimated that a competent adult had a "liberty interest" in refusing unwanted medical treatment—although noted that this was not an absolute right. However, the core dilemma in Cruzan's case was that she was incompetent.

- Although the *Cruzan* Court recognized a right to decline unwanted medical treatment, it said that states were free to require clear and convincing evidence of an individual's wishes before allowing family members to act on his or her behalf. In addition, a patient

who wants to commit assisted suicide is not seeking to have a feeding tube withdrawn but to have lethal medication applied. Also, the courts had long recognized a distinction between actively killing and passively allowing a patient to die.

- Ultimately, Cruzan's family went back to court for a new hearing using the clear and convincing evidence standard. Though the family had no new evidence of Cruzan's wishes, the lower court found again that Nancy Cruzan would have wanted to terminate treatment. Nearly eight years after her accident, her feeding tube was removed, and she died on December 26, 1990.

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Doctors and nurses can face criminal charges for murder as a result of administering palliative care to patients.

- In 1997, the constitutional status of the right to die was before the Court once again in *Washington v. Glucksberg*. In the years between *Cruzan* and *Glucksberg*, the idea of physician-assisted suicide had gained national prominence. Beginning in 1990, Dr. Kevorkian assisted more than 100 suicides and successfully defended himself in four highly publicized murder trials for the deaths of six patients.

- Many Americans were sympathetic to the idea of physician-assisted suicide. In 1994, voters in Oregon passed the Death with Dignity Act, which legalized physician-assisted suicide for competent, terminally ill adults.

- The vast majority of states rejected similar laws or specifically passed bans on physician-assisted suicide. One of these states was Washington, which had passed a law criminalizing the assistance or promotion of suicide. In 1996, a federal appellate court struck down

the Washington state law and expansively declared a constitutional right to "determine the time and manner of one's own death."

- In 1997, the Supreme Court unanimously rejected the claim that there was a constitutional right to physician-assisted suicide. The Court drew a clear distinction between *Cruzan*, in which it "strongly suggested" that the Constitution protected individuals' right to refuse unwanted medical treatment, and the affirmative right to assisted suicide recognized by Judge Reinhardt in *Glucksberg*.

- Although concurring in the result of the right-to-die cases, five justices insisted on preserving the possibility that the Court might, in the future, recognize a more limited right to die with dignity in circumstances where patients were terminally ill and suffering great pain. Justices Breyer and Sandra Day O'Connor intimated that if a state law could possibly violate a constitutional liberty interest in humane treatment if it met two conditions: if it regulated palliative care—or the administration of pain-relieving medication—in order to prevent the administration of ultimately lethal or toxic doses of painkillers and if patients as a result endured terrible physical suffering before death.

- Whether described as the "right to die," the right to have "control of one's final days," the "right to choose a humane, dignified death," or the "liberty to shape death," the Court rejected it as a constitutionally protected interest. In doing so, the Court refused to recognize a sweeping, abstract right of bodily and personal autonomy and dignity. However, in 2006, the Court struck down attempts by the federal Department of Justice to interfere with the implementation of Oregon's Death with Dignity Act, which permitted physician-assisted suicide. Physician-assisted suicide now remains open for states to endorse or prohibit as they see fit.

Avoiding Right-to-Die Struggles

- The best thing you can do to avoid the wrenching legal struggles at the center of the right-to-die cases is to execute a living will, which specifies the type and degree of treatment that an individual wants

to receive. They may be general, or they can address specific forms of treatment.

- Another form of directive is an appointment directive, also known as delegating powers of attorney, which allows an individual to delegate decision-making authority to another person in the event that the person becomes incompetent. Unlike a living will, which specifies a person's own decisions in advance, power of attorney gives the delegated individual varying discretion to choose medical treatment in response to particular situations.

- A health proxy is similar to a power of attorney but is usually more limited in scope. It is usually a part of a treatment directive, or living will, and indicates who will make decisions on the patient's behalf. Unlike a power of attorney, in which the appointed decision maker can step in whenever the patient is incompetent, a health proxy usually only is needed when the patient is terminally ill.

- Many hospices and states have endorsed a document called *Five Wishes*, which was developed by the organization Aging with Dignity. The first two wishes are basically power of attorney and living will. The third wish addresses how comfortable a person wishes to be, including pain management and desire for hospice care. The fourth wish elaborates how an individual wishes to be treated, which can include remaining at home or having someone pray at one's bedside. The fifth wish indicates what an individual wants his or her loved ones to know, including expressions of forgiveness and preference for cremation or burial.

Medical Futility Laws

- In some states, a living will may not guarantee your desire to receive life-sustaining medical treatment until the moment of death. These are states that have adopted so-called medical futility laws. In 1999, for example, Texas passed the Advance Directives Act, which permits doctors to refuse to provide further life-sustaining medical treatment when it is deemed "inappropriate" or medically futile—that is, when there is no hope of the patient

recovering or improving. If the patient or his surrogate opposes the decision and requests that everything be done to continue treatment, the doctors may ultimately refuse. To resolve these medical futility disputes, hospitals often progress through various dispute resolution mechanisms.

- First, the health care providers attempt to convince the surrogate or patient about the futility of further treatment and clarify the patient's goals, values, and wishes. If this fails, a bioethics consultant is used to mediate between the patient or the patient's surrogates and the doctors to hopefully reach a treatment plan that is agreeable to all parties. If not, then doctors can appeal to the institution's ethics committee to intervene; the committee usually sides with the doctors and recommends terminating treatment. In some cases, the hospital may give the surrogate or patient a certain amount of time to find a new facility that is willing to provide the futile treatment. If no alternative facility will accept the patient and if the surrogate will still not consent, then the hospital can unilaterally terminate life-sustaining treatment against the express wishes of a family member or the patient.

- These unilateral acts are rare but extremely controversial. A Houston hospital fought to terminate treatment for Andrea Clark, a 54-year-old woman suffering from severe, terminal cardiac problems—even though her sister said that Clark wanted extraordinary measures taken to keep her alive. In addition, Texas hospitals have terminated treatment for babies with dim prognoses, even when their parents have demanded that everything be done to sustain them.

- Other controversial cases have arisen when hospitals have been accused of removing life support from patients because their indigent families could not afford the medical bills. Some families have recovered damages from hospitals for intentional and negligent infliction of emotional distress when doctors removed loved ones from life support in a particularly insensitive or outrageous way.

Suggested Reading

Lewin, "Nancy Cruzan Dies."

Rosen, *The Most Democratic Branch*.

Quill, "Terri Schiavo."

Questions to Consider

1. Do you think the Supreme Court should recognize a right to die in cases where a patient wants to remove life-sustaining treatment, is terminally ill, and is in great pain? Do you know anyone who has been in this agonizing situation? If you were executing a living will, would you direct that life-sustaining treatment be removed in cases of terminal illness?

2. What do you think of medical futility statutes that allow doctors to override the wishes of family members and to remove life-sustaining treatment when further medical treatment would be futile? Are your views on these laws consistent with your views about whether there should be a constitutional right to die?

Privacy and Sexual Intimacy in Marriage

Lecture 15

The Supreme Court's landmark decisions guaranteeing married couples access to contraception and denying a broad right to die were consistent with national polls. In this lecture, you will find that the Court has been similarly sensitive to public opinion in cases involving eugenics, marriage, and gay rights. In each of these controversial areas, courts have been powerless to challenge deeply felt currents of public opinion and have been most effective when they have followed a national consensus after it has crystallized—rather than trying to coax one into being ahead of schedule.

Eugenics

- The fate of involuntarily sterilization laws in America is an illustration of the limited ability of courts to protect autonomy in the face of public enthusiasm for restrictions on reproduction. Today, it's hard to imagine anything more cruel and illiberal than involuntary sterilization, but during the first half of the 20th century, compulsory sterilization was extremely popular. It was encouraged by the American eugenics movement, which supported what it called the science of better breeding.

- Far from being imposed on an unwilling nation, eugenics was enthusiastically supported by progressive medical, political, and even religious leaders as a way of protecting the racial integrity of America from the perceived threats posed by immigration and urbanization.

- In response to this public enthusiasm, legislatures in 16 states between 1907 and 1913 passed laws authorizing the sterilization of "defective" people, defined loosely as "idiots" and "imbeciles." During the next five years, seven of the state sterilization laws were challenged as unconstitutional by opponents of eugenics. In the

absence of a congressional consensus on the question, lower courts struck all seven of them down.

- Believe it or not, these decisions appear to have had little practical impact on the debate over eugenic sterilization in America. In the face of continued public enthusiasm for eugenics, state legislatures simply passed new sterilization laws with minor procedural protections added to inoculate them against future constitutional attack. Between 1923 and 1925, 14 state legislatures passed sterilization laws, and by the end of 1925, sterilization programs were operating in 17 states.

- The Supreme Court had little difficulty dismissing the various constitutional attacks on these laws. In *Buck v. Bell* (1927), Justice Oliver Wendell Holmes wrote an eight-to-one opinion for the Court vigorously rejecting constitutional challenges to a Virginia law that allowed the state to sterilize the feebleminded inmates of state institutions in order to prevent the birth of feebleminded children who might turn to indigence or crime.

- After *Buck v. Bell* removed any remaining constitutional doubts about sterilization laws, state legislatures continued to resurrect them with renewed vigor. In 1942, in the middle of World War II, the Court in *Skinner v. Oklahoma* invoked the reality of Nazi sterilization laws, which had been inspired by the American eugenics laws. In *Skinner*, Justice William Douglas said that lower courts might use the equal protection clause to strike down habitual criminal laws, but courts in only 2 out of 30 states accepted the invitation.

- Sterilization laws remained on the books in 26 states at the beginning of the 1960s. In fact, Oregon conducted the last state-sponsored sterilization in 1981. As recently as 1985, the sterilization of the mentally retarded was allowed in at least 19 states. In the end, the American enthusiasm for sterilization was cooled not by the courts, but by World War II and, ultimately, by the civil rights movement.

Marriage and Miscegenation

- Public opinion also played a role in the Court's decision to overturn Southern antimiscegenation laws. In 1956, just two years after *Brown v. Board of Education*, a white wife and Chinese husband petitioned the Supreme Court to overturn Virginia's Racial Integrity Act, but the Supreme Court declined to hear the case based on Justice Felix Frankfurter's concern that public support for bans on interracial marriage was far stronger than public support for school segregation. Frankfurter feared that the backlash to a decision striking down the interracial marriage bans would make it more difficult for the public to accept the Court's decisions striking down segregation.

- As a result, white and black men and women who loved each other but were of different races had to wait 13 years until their constitutional rights would be vindicated by the Supreme Court in *Loving v. Virginia*, decided in 1967.

- Only nine states and the District of Columbia never had interracial marriage bans. Eleven states repealed their bans in the 18th or 19th century. In 1948, in the seminal California Supreme Court case *Perez v. Sharp*, California became the first state to repeal an antimiscegenation law since 1887. In the 1950s and 1960s, as the civil rights movement gained momentum, 13 other states followed suit.

- In 1967, when the Supreme Court heard *Loving v. Virginia*, only 16 states still had antimiscegenation laws, and disapproval of interracial marriage remained high among white Americans. Mildred and Richard Loving were a black woman and white man from Virginia who married in Washington, DC, in 1958 to circumvent Virginia's Racial Integrity Act, which banned interracial marriage. Then, they returned to Virginia, where the law also prohibited interracial couples from leaving the state to contract marriages that would have been prohibited under Virginia law. Their marriage was automatically voided, and both were convicted of miscegenation, a felony that carried a prison term of one to five years. The Virginia

court gave the couple the option of avoiding prison by promising to leave the state for 25 years, so the Lovings moved to DC and appealed their convictions.

- The highest state court in Virginia, the Supreme Court of Appeals, affirmed their convictions, but the U.S. Supreme Court disagreed. The Court explicitly established that the right to marry is a fundamental right under the due process clause of the Fourteenth Amendment. As a fundamental right, states could not restrict it solely on the basis of "invidious racial discriminations." Apart from "invidious discrimination" for its own sake, there was no independent, legitimate purpose for banning interracial marriage.

Gay Rights

- The Court's emerging recognition of gay rights also followed the polls. The Court upheld the constitutionality of laws criminalizing homosexual sodomy in *Bowers v. Hardwick* (1986). This was in the middle of the AIDS epidemic, and public acceptance of homosexuality was at a relative low: Only one-third of Americans believed homosexual acts between consenting adults should be legal while almost two-thirds believed they should not be.

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Before *Goodridge*, only four U.S. states had adopted bans on gay marriage.

- *Bowers v. Hardwick* involved a challenge to a Georgia law that prohibited sodomy—whether committed by same-sex or different-sex couples. Using the historical methodology that the Court would reaffirm in the right-to-die cases, Justice Byron White noted that "in 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States of the Union had criminal sodomy laws. In fact, by 1961, all 50 States outlawed sodomy. By 1968,

the number had fallen to 24." Nevertheless, White, a dissenter in *Roe v. Wade*, was unwilling to "take a more expansive view" of the Court's authority to discover new fundamental rights.

- The Court's refusal to constitutionalize the gay rights debate allowed public opinion to evolve in a more liberal direction during the 1980s and 1990s without being distorted by a backlash against judicial overreaching. By 2003, when the Supreme Court overturned *Bowers* in *Lawrence v. Texas*, the vast majority of states had repealed their sodomy laws, and the 13 states that still had them almost never enforced them against consenting adults who committed acts in private. Furthermore, public opinion had inverted: While only about 40 percent of Americans believed homosexuality was morally acceptable, 60 percent of Americans believed that homosexual acts should not be criminally sanctioned.

- In his opinion for the Court, in *Lawrence v. Texas*, Justice Anthony Kennedy cited the repeal and invalidation of 12 sodomy laws in the previous 17 years as evidence of a shift in national attitudes toward homosexual intimacy since *Bowers* was decided. However, there was a sharp public opinion backlash in the wake of *Lawrence*; level of support for decriminalizing sodomy rapidly plummeted from 60 percent to 50 percent and then slowly climbed upward over the next several years.

- In *Goodridge v. Department of Public Health* (2003), the Massachusetts Supreme Court struck down a state ban on marriage by same-sex couples and declared a broad right of same-sex couples to marry. In the wake of *Goodridge*, 13 states added to their constitutions amendments that banned gay marriage—all by overwhelming margins.

- In Congress, a proposed constitutional amendment to ban gay marriage was introduced in 2004, with President Bush's endorsement, but failed to win the required two-thirds support in the Senate.

- The number of states recognizing same-sex marriage is now six: Massachusetts, New York, Connecticut, Vermont, New Hampshire, and Iowa (in addition to the District of Columbia). Eleven other states and the District of Columbia also have "civil unions" or "domestic partnership" laws that grant same-sex couples similar—or even identical—legal rights as married spouses.

- However, 39 states have chosen to explicitly codify the definition of marriage as the union of a man and woman—29 by constitutional amendment and 10 by statute. Since 1998, same-sex marriage has been an issue on state ballots 32 times, and in every instance, voters were in favor—usually by healthy margins—of opposite-sex-only marriage. As of 2012, no state had ever legalized same-sex marriage via popular vote.

- Between 2004 and 2012, the conflict over same-sex marriage in California produced a dizzying legal seesaw between affirmation for and fierce backlash against same-sex marriage. In 2004, the mayor of San Francisco authorized city officials to issue marriage licenses to gay and lesbian couples, and thousands took advantage. In 2005, the California legislature passed a law permitting same-sex marriage, which was vetoed by the governor. In 2008, the California Supreme Court held that barring same-sex couples from marrying violated the state constitution. In the wake of the decision, thousands of other gay and lesbian couples married.

- However, roughly 52 percent of Californian voters reversed this decision by approving Proposition 8 the following November, amending the state constitution to limit marriage to a man and woman. After Proposition 8 passed, its opponents immediately challenged it in federal court. The district court that heard the challenge to Proposition 8 in 2008 found that it violated the due process and equal protection clauses of the U.S. Constitution. In 2012, the Ninth Circuit declared Proposition 8 unconstitutional on equal protection grounds.

- In 2010, the attorney general of Massachusetts and Gay & Lesbian Advocates & Defenders (GLAD) filed legal challenges in federal court to Section 3 of the Defense of Marriage Act (DOMA), which defines marriage as only between a man and woman for federal purposes. Passed in 1996, DOMA also stipulates that no subfederal entity is required to recognize same-sex marriages performed in other jurisdictions.

- In *Gill v. Office of Personnel Management* and the companion case *Commonwealth of Massachusetts v. Department of Health and Human Services*, a district court judge found that DOMA violated Congress's legislative powers under Article I and violated the due process of the Fifth Amendment.

- Judged by the trajectory of opinion polls, the nationwide legality of same-sex marriage seems inevitable. Not only has public support for gay marriage increased, but it has increased very steadily and rapidly. In 1996, when DOMA was passed, almost 70 percent of Americans opposed same-sex marriage. Eight years later, in 2004, a healthy majority of 60 percent still opposed it. However, between 2004 and 2012, opposition to same-sex marriage steadily declined from 60 percent to roughly 45 percent while support increased from roughly 35 percent to over 50 percent.

- There is also a striking generation gap in public opinion regarding same-sex marriage—and gay rights in general. Studies have shown that young people strongly support same-sex marriage rights while older people strongly oppose them. Interestingly, the generation gap persists regardless of young peoples' faith or religiosity, political affiliation, or ethnicity.

- In recent years, there have been other indicators that support for gay rights is no longer a niche issue of the Democratic Left, but a mainstream civil rights issue. The policy barring gays and lesbians from serving openly in the military—"don't ask, don't tell"—was repealed in 2010 with the support of three-quarters of Americans.

- In 2012, President Obama became the first American president to voice his personal support for same-sex marriage, but in May 2012, 60 percent of North Carolinians—a state that Barack Obama carried in 2008—voted in favor of a constitutional amendment barring same-sex marriage, even though it was already barred by statute.

- A Supreme Court decision on same-sex marriage today would likely engender a backlash on either side. Some activists maintain that the Court should hold off until public opinion settles into some degree of consensus.

Suggested Reading

Barnes, "California Proposition 8 Same-Sex-Marriage Ban Ruled Unconstitutional."

Klarman, *From the Closet to the Altar.*

Sullivan, *Same-Sex Marriage*.

Questions to Consider

1. Discuss your views about gay marriage. Have they changed over time? Why or why not? Do you think the Supreme Court should recognize a right to gay marriage? If so, should the Court recognize the right now, or would it be better to wait for a few years until there is a solid majority in the country that supports the right? Is it appropriate for justices to consider the impact of their decisions on the Court's legitimacy when they decide when and how to issue a decision?

2. Were you surprised to learn that there was such broad bipartisan support during the Progressive era for eugenics laws mandating the sterilization of so-called imbeciles? Can you think of reproductive technologies today, such as human cloning, that might have similar support?

The Constitution and Private Property

Lecture 16

The Constitution and the Bill of Rights provide a variety of protections for private property. In this lecture, you will learn about the Second Amendment's protection of the right to bear arms and recent Supreme Court cases interpreting it. You will also learn about the privileges and immunities clause, the full faith and credit clause, and the copyright clause, which all protect individual property rights in an effort to retain national unity. Furthermore, you will learn about the Third and Fourth Amendments, which provide much more direct protection for individual property interests.

The Second Amendment

- The Second Amendment says the following: "[a] well regulated militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The case law and scholarship on the meaning of the amendment are vast and cacophonous, particularly when it comes to the original intentions of the generation that ratified it.

- Gun control proponents suggest that the language in the preamble to the amendment about "[a] well regulated militia" means that the Second Amendment protects a collective right that permits extensive government regulation of all firearms. However, gun rights proponents counter that the amendment was passed to protect traditional common law concepts of individual self-protection and, therefore, allows few regulations of gun ownership.

- The truth probably lies somewhere in the middle. The framers meant both to protect an individual right to bear arms and to allow extensive gun control. Revolutionary-era state constitutions recognized that "the people have a right to bear arms for the defense of themselves and the state." They didn't say anything about limiting the right to people serving in a state militia. This individual-rights reading is not in tension with the preamble to the

Second Amendment because the militia was composed of the entire adult male citizenry, who were not only allowed but also required to keep guns.

- The original purpose of the Second Amendment was to prevent the government from disarming the entire civilian population—out of a belief that keeping arms in the home and bearing arms for military and nonmilitary uses was necessary for individual self-defense. Moreover, while the Founding Fathers thought the Second Amendment's main purpose was to protect state militias, the authors of the Fourteenth Amendment, ratified after the Civil War, saw the right to keep and bear arms more explicitly in terms of individual self-defense, allowing the freedmen to defend themselves from racist Klansmen and state militias.

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The competing camps in the gun control debate vigorously divide over the following question: Is the right to bear arms an individual right?

- At the same time, Americans have always had gun control of the kind that the modern National Rifle Association (NRA) would never tolerate. For example, in the founding generations, law-abiding people who failed a political test of loyalty to the American Revolution were denied the right to own guns.

- It's impossible to understand the original meaning of the Second Amendment without recognizing the role of militias in the American Revolution. Far from meaning that the amendment had nothing to do with personal possession of weapons, however, the role of the militia highlights the property interests served by the amendment. Because of the need for a strong militia, the founders

thought that keeping a musket in the home was protected by the Second Amendment.

- While personal possession of weapons for possible military use was constitutionally protected, the framers seem to have been less concerned with protecting nonmilitary weapons through the Second Amendment. In fact, regulations of nonmilitary weapons continued in the early republic, even after the Second Amendment was ratified.

- For all of the regulation of gun possession at the time of the framing, it appears that there was almost no attempt to deny people the right to own weapons. The Supreme Court's approach to the Second Amendment has generally recognized and recently enhanced this distinction between property and use. In *Robertson v. Baldwin*, decided in 1897, the Supreme Court said, "The right of the people to keep and bear arms … is not infringed by laws prohibiting the carrying of concealed weapons," but said nothing of limitations on gun ownership.

- Forty-two years later, in 1939, the Court in *United States v. Miller* revived the distinction between military and nonmilitary use suggested by the text of the Second Amendment. The Court's holding in the case suggested that the federal government could ban possession of any weapon, whether for sale or the property of an individual, unless that weapon could presently be shown to serve the needs of the militia.

- *Miller* could have marked a sea change in the gun control in the United States, but because the Supreme Court had not yet held that states were bound by the Second Amendment and Congress did not attempt any blanket bans on guns, the issue lay relatively dormant until the Supreme Court's 2008 decision in *District of Columbia v. Heller*. Along with Chicago, the District of Columbia had one of the most draconian gun control laws in the country, banning possession of handguns in the home. In striking down the handgun ban, the

Court took the position that the Second Amendment protected guns as a way of protecting property.

- In 2010, the Court extended this view to the states in *McDonald v. City of Chicago*, which was a challenge to a Chicago ordinance that banned the possession of handguns anywhere in the city, including the home. *McDonald* held for the first time that the Second Amendment restrains both the federal government and the states. In examining the centrality of the Second Amendment to the concept of "ordered liberty" and incorporating it against the states through the Fourteenth Amendment, the Court again relied on the notion that gun possession both protects against governmental tyranny and allows one to defend his or her own property in the home.

The Copyright, Full Faith and Credit, and Privileges and Immunities Clauses

- The copyright, full faith and credit, and privileges and immunities clauses also protect the property rights of American citizens. Like the Second Amendment, they protect those rights in part because of the inherent value of personal property and in part because some personal property rights are necessary for the Constitution to function properly. Unlike the Second Amendment, these clauses achieve that goal by defining the legal status of people as they travel from one part of the country to another and protecting them from interference by the individual states.

- Among Congress's enumerated powers in Article I is the so-called copyright clause, which empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." So far, Congress has only used the clause, known as the science and useful arts clause, to establish the copyright, patent, and trademark regimes in use today. That power is exercised exclusively through the United States Patent and Trademark Office, an agency within the United States Department of Commerce, and the United States Copyright Office, which is a division of the Library of Congress.

- Much like the Second Amendment, the history of the copyright clause is subject to debate. At some times, it's framed as an attempt to protect individual liberty, and at other times, it's viewed as an anchor for the federal system created by the Constitution.

- The particular contours of the copyright clause are important because they define the breadth of the protections available under the clause. An expansive approach to the copyright clause, such as the view that property rights in intellectual labor come from God rather than government, may clash with the First Amendment's protection of free speech. As a result, both state laws and the copyright clause take what has come to be known as the utilitarian approach, which justifies the intellectual property laws as a way of furthering societal interests. Within this view, the "monopolies" permitted by Article I Section 8 are justified because they are the only way of encouraging people to participate in the type of projects that will advance American science, culture, and society.

- In the rare cases where the Supreme Court has dealt with the constitutional aspect of copyright, it has embraced the utilitarian approach. In 1834, in *Wheaton v. Peters*, Henry Wheaton, who was the Supreme Court's reporter of decisions, sued his successor, Richard Peters, under common law copyright. Wheaton had spent considerable time and money compiling and annotating Supreme Court opinions and arguments. When he retired, Peters came into possession of his reports, abridged them, and sold them for a profit.

- The Court rejected Wheaton's attempt to rely on English common law traditions of copyright that would have given him sole control of his work product. It held instead that the adoption of the copyright clause meant that in the United States, there was no right to exclusive publication of a particular work until one received a copyright for that work from the federal government. Until that time, there is no right against publication. Thus, the Court appeared to reject a more expansive view of copyright and embraced utilitarianism. Under the Constitution, only an affirmative act of

Congress (or an agency to which it delegates power) can create intellectual property.

- More recently, in *Eldred v. Ashcroft*, decided in 2003, the legal scholar Lawrence Lessig of Harvard Law School challenged the Sonny Bono Copyright Term Extension Act, which allowed the Copyright Office to extend the normal length of a copyright, which is the life of the author plus 70 years, by 20 years and possibly into perpetuity through repeated extensions.

- In upholding the constitutionality of the Bono Act, the Court held that as long as there was some determinative end to a copyright, it would defer to the judgment of Congress about whether the length of a copyright was appropriate. In practice, this means that Congress is not required to act to protect intellectual property rights, but when it does so, it has almost plenary authority.

- The full faith and credit and privileges and immunities clauses are both directed to the same goal: ensuring national unity and uniformity by requiring states to honor the property and legal status of people from other states. Unlike the Second Amendment and copyright clause, the origins of these clauses rely far less on any notion of individual property rights and are driven instead by the realities of dual sovereignty. They both protect property rights, but only as means to a larger end.

- The full faith and credit clause is perhaps the most powerful of the clauses in the state's relation article because it was designed specifically to protect vested contract and property interests across state lines. The framers of the Constitution were acutely aware of the need for powerful constitutional protection of these property rights because during the time of the Articles of Confederation, state discrimination against noncitizens was so rampant that it seriously threatened national unity.

- The comity clause is more intertwined with personal rights than the full faith and credit clause. The comity clause forbids states from

obstructing one's ability to cross state lines to pursue a livelihood or engage in business, unless the state can demonstrate that there is a substantial interest involved.

- In one of the few cases that the Supreme Court has taken in this area, *Toomer v. Witsell*, the Supreme Court showed that the protections provided by the privileges and immunities clause are only triggered when one's livelihood is threatened.

The Third and Fourth Amendments

- Perhaps the most explicit and powerful protections of property other than the due process clause are the Third and Fourth Amendments.

- The Third Amendment states that "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." This amendment has unsurprisingly garnered very little attention from the Supreme Court, but the Court has suggested at various times that the power of the protection of the home through the Third Amendment is equal to the protection of the Fourth Amendment.

- The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Although it is conceived today as a protection for privacy, it was originally conceived as a protection for private property. In a broad sense, property rights are involved in almost every Fourth Amendment case.

Suggested Reading

Spitzer, *The Politics of Gun Control*.

Winkler, *Gunfight*.

Questions to Consider

1. Do you agree with the Supreme Court that the Second Amendment protects an individual right to bear arms that protects people's right to own guns in their home? Whose view of the constitutional history of the Second Amendment persuades you most—Justice Scalia for the majority or Justice Stevens for the dissenters? Given the fact that the framers didn't think about many of the gun control measures that are being debated today, should or can the Court try to channel their views?

2. Which of the Constitution's explicit provisions protecting private property matters the most to you—and why? Is it the privileges and immunities clause, the full faith and credit clause, the copyright clause, or the takings clause?

The Supreme Court and Private Property

Lecture 17

Although the framers of the Fourteenth Amendment were especially suspicious of monopolies and large corporations, there has been an energetic debate since the Gilded Age about whether the Supreme Court is tilted in a probusiness direction, favoring large corporations over individuals and small businesses. In the next two lectures, you will learn about the Supreme Court and economic liberty—from the decisions striking down maximum hour laws during the Progressive era to the decision upholding the Affordable Care Act during the Obama administration.

Freedom of Contract

- The Constitution doesn't contain the words "freedom of contract," but from the Jacksonian era to the Gilded Age, lower courts struck down laws that granted special economic privileges to one group of competitors over another, as a form of "class legislation." Economic favoritism was considered unfair in a laissez-faire market where labor and capital were considered perfectly capable of tending to their own interests without state interference.

- The Fifth Amendment prevents the federal government from depriving anyone of "life, liberty, or property, without due process of law," and after the Civil War, Congress proposed and the states ratified the Fourteenth Amendment, which imposes the same prohibition on the states.

- The first case to test the scope of the economic liberty enshrined in the Fourteenth Amendment was the infamous *Slaughter-House Cases*, decided in 1873. In this case, the Supreme Court heard a challenge to a Louisiana statute that mandated that butchers conduct their trade in a designated city slaughterhouse under an early zoning law that improved sanitation and public health. As refrigerated railway cars began to take New Orleans beef across the

country, butchers dumped their waste into the river, threatening the health of citizens downstream.

- To deal with the public health challenge, the city created a state-of-the-art slaughterhouse facility and created a monopoly, giving the Crescent City Livestock Landing and Slaughter-House Company the exclusive right to operate it. The question in the case was whether this was an impermissible form of economic favoritism or a fair solution to a genuine health risk—after all, the slaughterhouse facility was open to any butcher who paid the required access fee.

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The Supreme Court has been accused of being probusiness, favoring large corporations over small businesses.

- Despite this open-access rule, competitors of the Crescent City Livestock Landing and Slaughter-House Company argued that the law created an impermissible monopoly, depriving them of property without due process of law as well as of the privileges and immunities of citizenship guaranteed by the Fourteenth Amendment. The Supreme Court rejected both claims, holding that because the slaughterhouse was open to all, the state of Louisiana had not deprived the New Orleans butchers of property or any other protected right.

- Around the time of the *Slaughter-House Cases*, the United States was entering into the Gilded Age. The rise of modern corporations allowed for the consolidation of wealth and property in fewer hands and gave rise to increasing economic inequality, which, in turn, left

more Americans dependent on industrial employment. To address the unequal bargaining power between capital and labor, state legislatures began to pass laws to regulate corporate operations and terms and conditions of employment.

- For the next few decades, the Supreme Court upheld some of these regulations and struck down others, based on the justices' attempts to apply formalistic legal categories about whether the regulations would serve the public interest or favor some economic competitors over others. The basic idea was that regulation was allowed in certain industries but not in others—based on whether there were special market failures that had to be addressed.

- In 1898, in *Holden v. Hardy*, the Supreme Court explained more clearly the test to be applied in evaluating infringements on freedom of contract. The Court upheld a Utah law that imposed an eight-hour workday maximum for miners on the grounds that mining is an especially dangerous profession.

The *Lochner* Era

- The most controversial liberty of contract case of the Progressive era began in 1895, when New York passed a law that made it illegal for bakeries to employ bakers for more than 60 hours per week. In 1899, Joseph Lochner, the owner of a bakery in Utica, New York, was fined $25 for violating the law. Two years later, he was fined $50 for a second offense. Lochner challenged the second fine, arguing that the statute was not a reasonable exercise of the state's police power and was, therefore, an infringement of his liberty of contract in violation of the due process clause.

- In a five-to-four decision in 1905, the Supreme Court struck down the New York law. The majority first rejected the state's argument that bakers could not adequately protect their own interests without state intervention. Next, the Court held that even if bakers could not protect their own interests, the state law limiting their working hours was not a reasonable measure to promote their health. The Court determined that the law was not related "in any real and

substantial degree to the health of the employees" and, therefore, was not a valid exercise of the state's police powers.

- There were two famous dissents in the *Lochner* case. The first was written by Justice John Marshall Harlan, who was most well known for his dissenting in *Plessy v. Ferguson*, the case that upheld railroad segregation in 1896. Justice Holmes wrote a separate dissent, one of the best-known dissents in American legal history. Unlike Harlan, who believed in the economic justice of the regulations he voted to uphold, Holmes had contempt for, as he put it, "the thick-fingered clowns we call the people."

- Holmes was a partisan of radical judicial abstinence; he believed that legislatures should be free to allow the dominant opinion of majorities to become law because if they didn't, violence might break out. Holmes noted a central connection between judicial restraint and democratic pluralism, but unlike Louis Brandeis, Holmes was not idealistic about the ability of democratic debate to produce truth.

- In the three decades after *Lochner*, a sharply divided Supreme Court struck down approximately 200 economic regulations, primarily labor laws, price regulations, and laws restricting entry into areas of business. However, in a slow retreat from *Lochner*, the Court upheld as many laws as it struck down.

- In *Muller v. Oregon* in 1908, the Court upheld a statute that barred women from working in laundries for over 10 hours per day, basing its decision on the "woman's physical structure." The justices were persuaded by a brief filed by Louis Brandeis, who assembled a mass of empirical evidence suggesting that women were physically weaker than men and, therefore, needed special protection.

- However, the *Muller* decision was no harbinger of judicial progressivism: In 1923, the Court struck down a law establishing a minimum wage for women in *Adkins v. Children's Hospital*. The Court distinguished minimum wages for women from maximum

hour caps because it found that although women were physically weaker than men, they were no less able to represent their own interests in negotiating for wages.

- As the economic reality of the Depression dislodged the laissez-faire assumption that labor and capital could fend for their own interests in a properly functioning employment market, the Court, following public opinion, began to change its tune.

- The first indication of the coming sea change was the *Nebbia* case, decided in 1934. New York dairy farmers faced dire financial straits during the Great Depression, and in response, the state established a Milk Control Board to set maximum and minimum retail prices. The Board set the price of a quart of milk at nine cents. Leo Nebbia was the owner of a grocery store who sold two quarts of milk for less than the minimum price.

- The Supreme Court upheld Nebbia's conviction, noting that "neither property rights nor contract rights are absolute," especially in instances where they are regulated in order to promote the general welfare. The Court suggested that because the New York legislature was well aware of the insufficiency of regular laws of supply and demand to correct the issues with milk prices, its actions were not unreasonable.

The End of the *Lochner* Era

- The Court's 1937 decision in *West Coast Hotel Co. v. Parrish* marked the end of the *Lochner* era. In that case, a hotel maid sued her employer for paying her less than the state's minimum hourly wage for women. The hotel's defense was that the minimum wage law was unconstitutional under the Supreme Court's earlier decision in the *Adkins* case, which had held that minimum wage laws were not reasonably related to women's health or welfare.

- In *West Coast Hotel*, the Court repudiated *Lochner*'s holding that the Constitution includes a freedom of contract. Instead, the Court held that the liberty guaranteed by the due process clause is not

violated as long as statutes are reasonably related to their purposes and are adopted to advance the interests of the community.

- The Court concluded that there was a legitimate public interest in protecting women from unscrupulous employers and that the minimum wage was a reasonable means of achieving that interest. The Court noted that when businesses exploit laborers by taking advantage of unequal bargaining power, they externalize costs to the entire community, which must pay to support them.

- The Court held that once the old laissez-faire assumptions had moved from being uncontested to being contested by American society, the Court's interpretation of the words "due process," "liberty," and "property" had to change to reflect the new reality. To fail to translate the Constitution in this way would be to guarantee less liberty than the framers of the Fourteenth Amendment took for granted.

- Since *West Coast Hotel*, the Supreme Court has completely rejected the "freedom of contract" methodology for reviewing economic regulations, embracing the role of the modern regulatory state in managing the economy after the crisis of the Great Depression and the New Deal era.

- The end of the *Lochner* era also saw changes in the Court's privacy jurisprudence. Under the Court's earlier decisions, it was considered a violation of the Fourth and Fifth Amendments for the government to examine or seize a person's or business's documents without consent. The Court's jurisprudence changed in response to the demands of the modern regulatory state.

- In *Marron v. United States*, the Supreme Court held that instrumentalities of crime, including documents, can be seized without violating the Fourth or Fifth Amendments. In *Shapiro v. United States*, the Court held that people and companies may be required to produce any records that the government has mandated them to keep—no matter how incriminating they are.

- In the 1938 *Carolene Products* case, the Court explained how its review of economic regulations had changed after *Lochner* was repudiated. Congress had enacted a law prohibiting the transport of "filled milk" in commerce, based upon a finding that it was "injurious to public health" and that "its sale constitutes a fraud upon the public." The Court found that these purposes would suffice to withstand rational basis review but also noted that even if Congress had not made explicit findings explaining its rationale, the Court must uphold a statute if it is reasonably related to any possible legitimate purpose.

- In practice, if judges can come up with some rational reason to justify an economic regulation, they'll uphold it, even if it wasn't the real reason that motivated the legislature. This emphasis on hypothetical reasons rather than real reasons can be seen in the 1955 case *Williamson v. Lee Optical*, in which the Court reviewed an Oklahoma law that made it illegal for opticians to make lenses for eyeglasses without a prescription.

- In an opinion written by Justice Douglas, the Court upheld the law. It was obviously intended to favor one group of economic competitors over others, but Douglas concluded that it was possible that the legislature had concluded that a prescription is necessary when new glasses are made to avoid health risks, for example, despite the complete lack of any evidence that this was the legislature's actual purpose.

- After the end of the *Lochner* era, the Court gave extreme deference to economic regulations at both the state and federal levels, but in 1971, the business community began to strike back. That was the year that Lewis F. Powell Jr.—then a corporate lawyer in Richmond, Virginia, and soon to be a Supreme Court justice—wrote a memo to his friend Eugene B. Sydnor at the U.S. Chamber of Commerce, urging him to begin a multifront lobbying campaign on behalf of business interests. Two months after he wrote the memo, Powell was appointed by Richard Nixon to the Supreme Court, and six years later, in 1977, after steadily expanding its lobbying efforts,

the Chamber of Commerce established the National Chamber Litigation Center to file cases and briefs on behalf of business interests in federal and state courts.

Suggested Reading

Hiltzik, *The New Deal*.

Holmes, "Dissent in *Lochner v. New York*."

Questions to Consider

1. The Supreme Court's decision in *Lochner v. New York* (1903), striking down maximum hour laws as a violation of the constitutional right to contract, is one of the most controversial decisions of the 20th century. Do you think the Supreme Court should protect a right to be free of regulations in the labor market, even if the Constitution doesn't contain the words "right to contract"?

2. Did the Supreme Court go too far in the other direction when it largely got out of the business of striking down state and federal regulations after 1937? How vigorously do you think the Court should protect economic liberty in the face of government regulations to the contrary?

The Roberts Court and Economic Rights

Lecture 18

Is the Supreme Court probusiness today? Is it favoring the interests of corporations over ordinary citizens by polarized, five-to-four votes? With his deft performance in the great health care case of 2012, Chief Justice John Roberts showed that he means to act strategically, over decades, always looking ahead and biding his time. However, there's no question that he will seize opportunities for unanimity when they arise. In fact, with the exception of the *Citizens United* campaign finance case, one of the areas where the Court has been most unified is in cases involving free speech.

Citizens United v. Federal Election Commission

- In 2010, Adam Liptak of *The New York Times* found that Chief Justice John Roberts's Court was supporting the U.S. Chamber of Commerce, which files briefs in cases affecting business interests, at a historically high rate. In the 2009 term, the side that the Chamber of Commerce supported won 13 of 16 cases. One of them was the *Citizens United* case, striking down restrictions on corporate spending in elections.

- Liptak also cited a study prepared for *The New York Times* that analyzed nearly 1,500 decisions since 1953 and found that the percentage of business cases on Roberts's court docket has grown, along with the cases in which business interests win. After five terms, the Roberts Court ruled for business interests 61 percent of the time, compared with 46 percent in the final years of the Court led by Chief Justice William Rehnquist. The percentage for all Courts since 1953 was 42 percent.

- In 2008, Justice Breyer acknowledged that the reason the Court might be considered probusiness is that there might be a difference between constitutional cases, where justices have strong preconceptions and philosophical commitments, and more technical, statutory cases, where they are more open-minded

and amenable to argument. If that observation is correct, it may explain why in some cases of interest to the business community, such as environmental, employment, and labor law cases, there are other strong commitments—the commitment to equality in the employment cases or to the environment or to labor—that may trump the free-market orientation that is shared by liberal and conservative justices in other business cases.

- Consensus doesn't prove that the Court isn't biased. It just shows that the traditional liberal-conservative splits in culture war issues don't carry on into business issues. There is an ideological bias on the Court; it's just that all the justices share the basic ideology when it comes to markets and regulation.

- The most obvious reason why the pro-business conservatives have been so successful while the libertarians have petered out is that there is no economic populist on the current Supreme Court—no justice in the tradition of William O. Douglas, who once boasted that he was eager to use the law to bend the law against the corporations and in favor of the environment. The fact that there's no economic populist on the Court reflects changes in the legal culture as well as the energetic efforts of the Chamber of Commerce and other groups to lobby for the appointment of free-market liberals and conservatives rather than economic populists or states'-rights conservatives.

- The lack of economic populists was evident in the *Citizens United* case, decided in 2010. The five-to-four ruling in *Citizens United v. Federal Election Commission* called into question decades of federal campaign finance law and Supreme Court precedents by finding that corporations have a First Amendment right to spend as much money as they want on election campaigns—as long as they don't consult the candidates.

- In *Citizens United*, a five-to-four majority of the Supreme Court held that the government may not restrict the ability of corporations and unions to spend money on political communications, such as

campaign ads. The Court's decision was based on the principle of "corporate personhood." When people form a corporation, Justice Anthony Kennedy suggested, that entity should be treated as an imaginary person that has the same rights that its individual members have.

- The Tillman Act of 1907 prohibited political spending by corporations and unions while permitting unfettered individual spending. Throughout the 20th century, the Court upheld these restrictions. In the 1990 case *Austin v. Michigan Chamber of Commerce*, the Supreme Court upheld a Michigan law prohibiting corporations from spending money to influence elections. The Court found that the law did not violate the First Amendment because "[c]orporate wealth can unfairly influence elections," and the law was narrowly tailored, despite its burden on political speech.

- The majority opinion in *Citizens United*, written by Justice Kennedy, overturned *Austin* and held that restrictions on corporate electioneering communications or spending on electioneering communications violate the First Amendment. Kennedy argued that the First Amendment protects associations of individuals, such as corporations, as well as individual speakers and also does not allow restrictions on speech based on the identity of the speaker. The majority also ruled that because spending money is essential to disseminating speech, limiting a corporation's ability to spend money unconstitutionally limits the ability of its members to associate effectively and to speak on political issues.

- Justice Stevens wrote a powerful dissent in *Citizens United*. He wrote that "a democracy cannot function effectively when its constituent members believe laws are being bought and sold." According to Justice Stevens, the Court had long recognized expenditures intended to influence elections as a potential corrupting force on the political process and one that Congress or the states could act to curb.

- Stevens also attacked the concept of corporate personhood. He noted that corporations are, in theory, immortal. They are required by state law to hold profitability over all other motives, are created to limit the liability of their owners for their actions, cannot vote, and have no sense of morality and no loyalty. He argued that such entities are not entitled to full speech protections under the First Amendment. Stevens explained that the First Amendment protects individual self-expression, self-realization, and the communication of ideas while corporate spending on elections is, by definition, only intended to maximize profits. He also noted that there is nothing to prevent the owners of corporations from spending their own personal funds on political speech.

- In addition to the invalidation of the federal campaign finance reform law, 24 states were forced to change laws prohibiting or limiting independent expenditures by unions and corporations. *Citizens United* led to the rise and proliferation of super PACs, which are political action committees that do not contribute to candidates or parties. As such, they can accept unlimited contributions from individuals, corporations, and unions.

- In addition, *Citizens United* permitted incorporated 501(c)(4) public advocacy groups, such as the Sierra Club or the NRA, as well as trade associations to contribute funds in electoral campaign. These groups may not, under the tax code, have a primary purpose of engaging in electoral advocacy. They are required to disclose their expenditures, but unlike super PACs, they are not required to reveal the names of their donors in their Federal Election Commission filings. A number of partisan organizations have since registered as tax-exempt 501(c)(4) groups and spent significantly on electioneering communications.

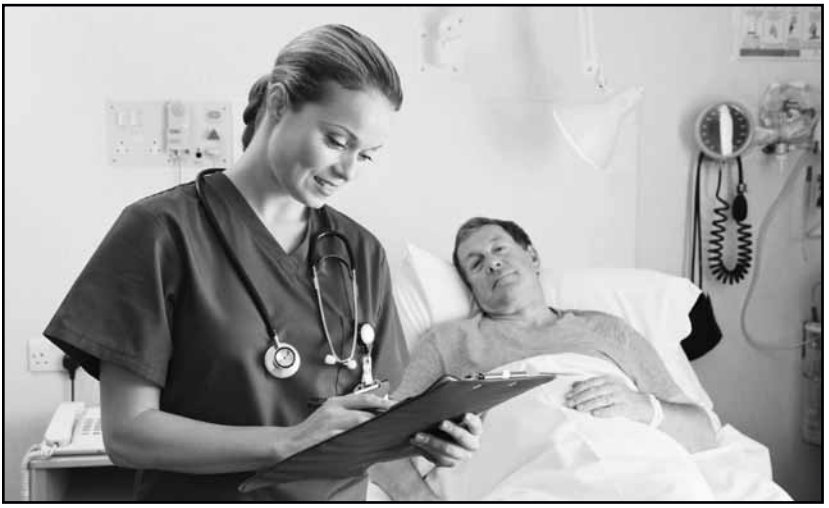
- In 2011, the Montana Supreme Court upheld the state's campaign finance law in *Western Tradition Partnership, Inc. v. Attorney General of Montana*. The Montana court examined the history of corporate influence in Montana politics that had given rise to the law and concluded that the legislature had a "compelling interest"

that it advanced through the law. The Montana court ruled that the restrictions on corporate speech under the law were narrowly tailored and, therefore, survived strict scrutiny.

- In June 2012, the same five-to-four majority that had prevailed in *Citizens United* voted summarily to reverse the Montana court's decision. The Court's ruling in that case thus makes clear that states cannot bar corporate and union political expenditures in state elections, even if their own political experiences suggest that such restrictions would curb corruption or the appearance of corruption.

The Great Health Care Case of 2012

- Shortly after he took office in 2009, President Obama set out to enact comprehensive reform of the U.S. health care system. The health care reform bill passed in March 2010, and it required every American to purchase insurance—or else pay a penalty known as the individual mandate. The act compensated states for the Medicaid expansion but required states to adopt the expanded program or else surrender their current Medicaid funding.



As a result of the health care case of 2012, health care has been a very controversial political topic.

- Several cases were filed in federal court challenging the constitutionality of the Affordable Care Act. The challengers, including both states charged with implementing the Medicaid expansion and private individuals, argued that Congress does not have the power to require individuals to purchase insurance and also that Congress had exceeded its spending power by forcing states to choose between expanding Medicaid and losing Medicaid funding entirely.

- On June 28, 2012, the Supreme Court ruled that the individual mandate was a constitutional exercise of Congress's power. Chief Justice Roberts wrote the deciding opinion, in which he concluded that the individual mandate was a tax and, therefore, was a valid exercise of Congress's tax power. Roberts's opinion gave some measure of optimism, however, to libertarians and business interests by suggesting that the individual mandate was not within Congress's commerce power.

- Roberts did not accept the government's argument that the mandate was a regulation of the economic activity of participating in the national market for health care; instead, Roberts found that the mandate was directed at what he termed "economic inactivity"—namely, being uninsured.

- Conservatives have long feared that Roberts might care too much about seeking common ground with liberal justices. While his political beliefs and judicial philosophy are conservative, Roberts employs a more conciliatory style than, for example, Antonin Scalia. Unlike, for example, Clarence Thomas, who lives in a conservative social bubble, Roberts cares deeply about the Court's image in the outside world. Therefore, when Roberts indeed became the only conservative to join the four liberals in voting to uphold President Obama's central legislative achievement, howls of betrayal from the Right soon followed.

- Meanwhile, liberals found themselves in the unexpected position of applauding Roberts for his act of judicial statesmanship—

unexpected because, in recent years, many on the Left had cast Roberts as a radical bent on rewriting vast swathes of U.S. law. For the first time, the health care ruling had exposed a deep rift between Roberts and his conservative colleagues.

- In early July, three days after the health care decision was released, Jan Crawford of CBS News reported that Roberts had initially voted with the four conservatives to strike down the health care law but later switched sides. The conservatives were livid, according to Crawford, accusing Roberts of folding to liberal pressure and refusing to join even the parts of his opinions with which they agreed.

- On the face of it, the conservatives' extreme displeasure was hard to fathom because Roberts's so-called betrayal was only partial. While he voted to uphold the Affordable Care Act, he joined the conservatives in accepting the novel argument that health care reform was unconstitutional because Congress can only regulate economic activity, not economic inactivity—such as the failure to buy health insurance.

- Perhaps the real reason for the conservatives' anger was that Roberts had decided to protect the long-term institutional interests of the Court rather than embrace the conservative ideological agenda in its most radical dimensions. In their joint dissent, Scalia, Alito, Thomas, and Kennedy railed about the need for the courts to protect states' rights and individual liberty—even if doing so meant overriding the wishes of the people's representatives. Roberts refused to join them. Instead, he emphasized Congress's broad powers to solve national problems and the importance of judicial deference to Congress's policy choices.

- Roberts also parted ways with his fellow conservatives over the question of Congress's spending authority. In one of the more convoluted sections of the ruling, seven justices found that the Affordable Care Act's expansion of Medicaid was unconstitutionally coercive because states that refused to participate would lose all

their federal Medicaid funding, amounting to more than 10 percent of their entire budgets.

- However, Roberts and the liberals allowed the Medicaid expansion to stand by making a pragmatic fix—they simply prevented the government from threatening to withhold existing Medicaid funds. The four conservatives would have struck down the entire expansion, using logic that would call into question the constitutionality of many federal grants that impose conditions on the states, not to mention Medicaid itself.

Suggested Reading

Clements, *Corporations Are Not People*.

Rosen, *"Big Chief."*

———, *"Roberts's Rules."*

———, *The Supreme Court*.

———, *"Supreme Court Inc."*

Questions to Consider

1. Do you agree with Chief Justice John Roberts's view that justices should put the institutional legitimacy of the Court above their ideological agendas in casting their votes, or do you think that justices should vote according to their view of what the Constitution requires, without considering the practical impact of their decisions?

2. The *Citizens United* campaign finance case held that corporations have the same First Amendment rights as natural persons. Do you agree? Why or why not?

Takings and Eminent Domain

Lecture 19

The framers of the Constitution were urgently concerned with protecting property rights, but there has been a vigorous debate since the founding era about whose property rights should trump: those of individual property owners or those of large corporations. In an effort to prevent corporate interests from dominating public debate, the Supreme Court was generally deferential to economic regulations from the mid-1930s through the first decade of the 21st century. More recently, however, the Court has begun once again to evaluate economic regulations skeptically and to strike them down.

The Most Controversial Takings Case

- In 2005, the Supreme Court decided the most controversial case of the modern era involving the takings clause of the Fifth Amendment, which says that private property shall not be "taken for public use, without just compensation." The case was called *Kelo v. New London*, and it involved the city of New London, Connecticut, a factory town that lost its industrial base and suffered economic decline.

- In 2000, New London adopted a development plan that it hoped would revitalize its waterfront and create jobs. To do so, the city decided to seize and demolish private property to make way for the anticipated hotels, restaurants, theaters, residences, shopping malls, office buildings, and research facilities that it hoped would rise from the wreckage. The city delegated the right to seize private property by eminent domain to a private, nonprofit corporation called the New London Development Corporation. The development corporation was then authorized to sell the property to developers by setting up an auction.

- The development plan targeted the Fort Trumbull neighborhood of New London, which was a largely blighted area. On the day

before Thanksgiving in 2000, Susette Kelo and her neighbors in Fort Trumbull received notice that their property would be seized by eminent domain if they didn't agree to sell to the development corporation. However, Ms. Kelo's section of Fort Trumbull was not blighted. She was not willing to sell her home, so she brought suit in state court. Ms. Kelo prevailed in state court after a seven-day trial, but the development corporation appealed to the Connecticut Supreme Court. In a four-to-three decision, the Connecticut Supreme Court reversed the trial court and upheld the seizure.

- By the time the case reached the U.S. Supreme Court, the pharmaceutical company Pfizer had built a factory in a portion of the redeveloped area, which the development corporation hoped would spur continued development, including in the area where Ms. Kelo's house stood. The Supreme Court upheld the decision of the Connecticut Supreme Court by a five-to-four margin, concluding that the seizure was for a constitutional "public use," even though the city intended that the property be sold to a private developer.

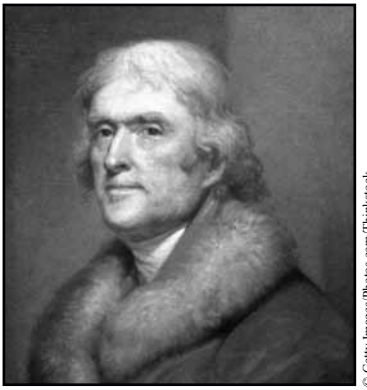
- *Kelo* triggered one of the most dramatic political backlashes in modern memory. Laws limiting the decisions have been adopted in 43 states. In Congress, the House of Representatives passed a resolution declaring its "grave disapproval" of *Kelo* by a vote of 365 to 33. Several bills were introduced in both chambers to prohibit federal takings for the sole purpose of economic development or state takings for such a purpose funded with federal money. However, none of these bills ultimately passed.

- On June 23, 2006, the first anniversary of the Supreme Court's decision in *Kelo*, President Bush issued an executive order providing that the federal government may not use eminent domain "for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken." However, the order has had limited effect because almost all takings are performed by state or local governments.

- As for the New London redevelopment plan, it proved to be a failure. The redeveloper was unable to secure financing for the project, and it was abandoned. The tract where Susette Kelo's house once stood is now an empty lot. The new site of the house stands as a monument for property rights activists with a plaque in front explaining the *Kelo* case. In general, urban renewal projects utilizing eminent domain have had mixed success.

Private Property and the Fifth Amendment

- The protections for private property in the Fifth Amendment include the following: "No person shall … be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." In drafting those final clauses, known as the due process clause and the takings clause, respectively, the framers were influenced by the work of the English philosopher John Locke, who declared that "life, liberty, and property" were among the natural rights of men.



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Thomas Jefferson (1743–1826) was the first secretary of state, second vice president, and third president of the United States.

- The Declaration of Independence, written by Jefferson, proclaims the inalienable rights of "life, liberty, and the pursuit of happiness." Why didn't Jefferson list property among the inalienable rights? According to Morton White's book *The Philosophy of the American Revolution*, Jefferson seems to have been influenced by the Swiss political theorist Jean-Jacques Burlamaqui, who insisted that property could not be viewed as an unalienable, natural right because it was not a direct gift from God but the product of a human act.

- Jefferson may also have been influenced by the Dutch natural law theorist Hugo Grotius, who coined the term "eminent domain," which he used to describe the lawful power of a government to seize or destroy the property of its subjects in pursuit of the common good—as long as the government made fair compensation to the owner of the property.

- The evidence suggests that the framers of the Constitution took a similar view. They intended for private ownership of property to be qualified rather than absolute and subject to balancing against the public interest. That view was embodied in the takings clause of the Fifth Amendment, which provides that the government may not take private property for public use without just compensation. It was clear from the beginning that the takings clause was intended to constrain only the federal government—not the states.

- In an opinion by Chief Justice John Marshall for the famous 1833 case of *Barron v. Baltimore*, the Court reasoned that the Bill of Rights applies only to the federal government, not to the states. This decision had implications not just for property law, but also for free speech, religious freedom, and the rights of accused criminals. All of those rights had to wait until after the ratification of the Fourteenth Amendment, proposed in the wake of the Civil War, to be applied against the states.

- Beginning in the 19th century, states used their eminent domain power not only to obtain land for government use, but also to transfer land to private owners for purposes such as mill construction, railroads, mining, and manufacturing. These takings were generally upheld by state courts. It wasn't until 1897 that the Supreme Court ruled that the takings clause applies to the states.

- The first major Supreme Court case interpreting the takings clause was *Pennsylvania Coal v. Mahon*, decided in 1922. In that case, Pennsylvania had prohibited coal mining under streets, houses, and places of public assembly. The Pennsylvania Coal Company had purchased the rights to conduct mining operations on many

properties and argued that the state of Pennsylvania, by preventing it from exercising those rights, had engaged in a taking.

- In an opinion by Justice Oliver Wendell Holmes, the Supreme Court ruled that states can enact regulations that affect land, but in this case, Justice Holmes ruled, Pennsylvania had gone "too far," so the coal company was entitled to compensation. Justice Holmes wrote: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

- Since the New Deal era, the Supreme Court has been far less critical of economic regulation. A similar Pennsylvania statute was found to not be a taking by the Supreme Court in a 1987 case, *Keystone Bituminous Coal Assn. v. DeBenedictus*.

Other Takings Cases

- The most important takings case of the modern era was decided in 1978. In *Penn Central Transportation Co. v. New York City*, the Supreme Court identified three criteria to determine whether a regulation had gone "too far" and a taking had occurred. First, there was "the economic impact" of the regulation on the landowner. Second, had the government physically invaded the property? Third, had the government instead implemented a regulatory scheme that merely burdened the use of the property?

- In the case of *Loretto v. Teleprompter Manhattan CATV Corp.* (1982), the Court identified a type of situation in which a landowner is deprived of economically beneficial use of property. The case held that the government must provide just compensation in the case of a so-called physical taking, when the government requires an owner to suffer a permanent physical invasion of his or her property—however minor.

- In *Lucas v. South Carolina Coastal Council* (1992), the Supreme Court identified another type of taking, a so-called total regulatory taking. The Court ruled that when regulations have completely

deprived an owner of "all economically beneficial use" of his or her property, the government must pay just compensation.

- In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002), a land developer sued for an alleged taking when the Tahoe planning board had declared a 32-month moratorium on development. The developer argued that while the property still had economic value during the moratorium, it was deprived of valuable economic use and that, therefore, compensation was required. The Supreme Court rejected this argument, finding that the developer had not been deprived of all economic use and that, therefore, the *Penn Central* test should be applied.

- In two other important cases, *Nollan v. California Coastal Commission*, decided in 1987, and *Dolan v. City of Tigard*, decided in 1994, the Supreme Court ruled that there must be a connection, or "nexus," between the anticipated effects of a land use and an "exaction," which is a condition for development that requires part of the land to be put to public use.

- Once courts have determined that economic regulation is a taking, how do they calculate just compensation? Most courts consider "just compensation" to be "fair market value," defined as the price that a fully informed, willing, and unpressured buyer would pay a fully informed, willing, and unpressured seller under ordinary circumstances. This approach is based on the most profitable possible use of the property, which could even be a use that is not permitted by current zoning if there is a reasonable probability that the zoning will change. One criticism of this system is that, in almost every state, attorneys' and appraisers' fees are not recoverable, so the owners of the taken property never recover the full value of the taken land.

Interpreting "Public Use"

- The first case interpreting the term "public use" was *Berman v. Parker*, decided in 1954. In that case, the Supreme Court reviewed

an effort by the District of Columbia, which had been authorized by Congress to seize and demolish areas of dilapidated row houses in Southwest Washington. The city planned to sell the land to private developers, who would build apartment buildings, office buildings, and shopping centers.

- The Supreme Court ruled against the owners of a newly renovated department store within the proposed area of redevelopment on the grounds that whether the project constituted a "public use" should be judged based on the plan as a whole and not parcel by parcel. The Court applied the extremely deferential rational basis standard to determine whether the taking was a "public use," which it equated with "a public purpose" and "the public welfare."

- The Court unanimously found that the stated purpose of ridding the city of a blighted neighborhood easily constituted a legitimate public purpose, and the taking was rationally related to that purpose.

- The Supreme Court also ruled on the meaning of "public use" in *Hawaii Housing Authority v. Midkiff* (1984). In that case, the government of Hawaii sought to use its eminent domain power to purchase land from an oligopoly of landlords, who had obtained their property under the quasi-feudal regime that had existed in Hawaii before its annexation. The government's stated justification was to reduce housing prices. The Supreme Court unanimously upheld the project as a "public use." Once again, the Court applied deferential rational basis review and found that reducing housing prices was a legitimate public purpose and that land redistribution was rationally related to that purpose. Ironically, though, the result of the project was rampant speculation, and housing prices in Hawaii skyrocketed.

Suggested Reading

Benedict, *Little Pink House*.

Posner, "The *Kelo* Case, Public Use, and Eminent Domain."

Questions to Consider

1. The *Kelo* decision held that the city of New London, Connecticut, could—with just compensation—seize the home of Susette Kelo and turn the land over to a private developer because urban renewal, the rejuvenation of downtown, was a legitimate "public use." Do you agree? Do you think that judges should generally defer to the economic decisions of legislatures, or should they make their own predictions about whether a particular urban renewal project is likely to succeed?

2. Discuss the ways that citizens can and should hold justices responsible for votes with which they disagree.

The American Free Speech Tradition

Lecture 20

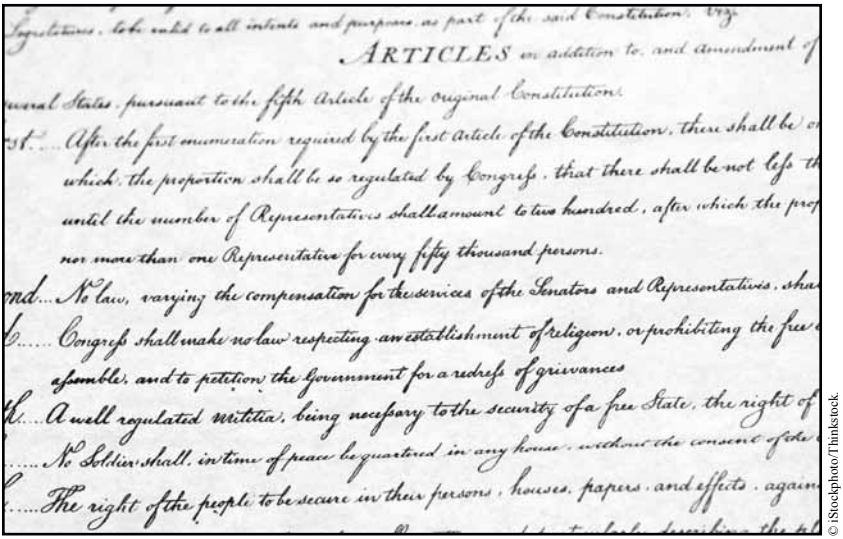
The First Amendment doesn't define the "freedom of speech," leaving it up to courts and citizens to determine what it means and when it can be abridged. In this lecture, you will learn that the crowning achievement of the American free speech tradition is the principle that speech can only be suppressed when it poses an imminent threat of provoking serious lawless action in response. Although that principle was articulated by citizens and juries during the founding and Reconstruction eras, it wasn't embraced by the Supreme Court until the 20th century.

The Constitutional Support of Free Speech

- A case that shaped the framers' views of the freedom of speech was the 1735 trial of John Peter Zenger, the printer of a New York City newspaper. When Zenger published articles critical of New York's colonial governor, the governor ordered Zenger's magazines to be seized and burned and had Zenger indicted for the crime of "seditious libel," which constituted any criticism of the government—and the truth of the criticism was no defense.

- Zenger's lawyer was Andrew Hamilton, a former attorney general of Pennsylvania, who argued that the truth should be a defense to libel and asked the jury to "nullify" the English seditious libel law. Zenger was acquitted, and although the jury nullification of the law had no precedential effect, the concept of truth as a defense became embedded in the law of the colonies.

- The framers were also influenced by the work of English jurist William Blackstone. Blackstone wrote that "where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law … the liberty of the press, properly understood, is by no means infringed or violated." According to Blackstone, the freedom of speech meant only that the government could not impose prior restraints on speech—that is, it could not


ARTICLES in addition to, and amendment of
After the first enumeration required by the first Article of the Constitution, there shall be
which the proportion shall be so regulated by Congress, that there shall be not less th
until the number of Representatives shall amount to two hundred, after which the prop
nor more than one Representative for every fifty thousand persons.
No law, varying the compensation for the services of the Senators and Representatives, shal
Congress shall make no law respecting an establishment of religion, or prohibiting the free
assemble, and to petition the Government for a redress of grievances
A well regulated militia, being necessary to the security of a free State, the right of
No Soldier shall, in time of peace be quartered in any house, without the consent of the
The right of the people to be secure in their persons, houses, papers, and effects, again

Because the First Amendment doesn't explicitly define the "freedom of speech," the courts and citizens of the United States have to determine what it means.

require licenses or permits for speech or otherwise censor speech or publication in advance. Once words were spoken or published, though, they were entitled to no protection, and their proponent could be punished based on their content.

The Alien and Sedition Acts

- The first and most important test of the original meaning of free speech in America came in 1798, when Congress passed the Alien and Sedition Acts, which allowed the president and Congress to silence their critics. The Alien Acts, among other things, gave the president the power to deport dangerous foreign-born residents and label them as alien enemies without a hearing. The Sedition Act made it a crime to publish "any false, scandalous, and malicious writing … against the government of the United States, or either house of the congress of the United States, or the president of the United States, with intent to defame … or to bring them … into contempt or disrepute."

- There was a competing view of the meaning of free speech—articulated not by Federalist judges but by citizens in the press, state legislatures, and public meetings. This view was embodied in the Virginia and Kentucky Resolutions, passed by the Virginia and Kentucky legislatures in 1798 and 1799, which criticized the federal Sedition Act as a violation of states' rights. The Virginia Resolution also suggested that the Sedition Act was unconstitutional under the First Amendment.

- Although the Virginia and Kentucky resolutions were powerless to spare those convicted under the Sedition Acts, public outrage at the convictions helped to trigger a congressional consensus that they were unconstitutional. Jefferson declared that Congress could not punish seditious speech, although he thought that states should have no hesitation about doing so.

- By 1840, four decades after the Sedition Act had expired, the House passed a bill recommending that the fine of one of the most prominent Republicans convicted under the Sedition Act should be repaid by Congress. The House committee report concluded that the act was "null and void" and that the unconstitutionality of the act had been "conclusively settled." However, it wasn't until 1937 that the Supreme Court found an opportunity to recognize what the House had acknowledged nearly a century earlier: that speech advocating political change could not be banned simply because it might possibly incite illegal activity. Instead, there had to be a more direct connection between the speech and the lawless action that followed.

Free Speech versus "Bad Tendency"

- The judges' gradual shift from abandoning their old view—that free speech only protected speakers against prior restraint by the government—and to embrace a new view—that free speech allowed vigorous criticism of government officials, unless there was a clear and present danger of lawless action—reflected a political consensus that the old legal doctrine was inadequate to protect democratic values.

- The old legal doctrine held that speech could be banned if it had a "bad tendency"—that is, if it might cause harm in the remote future. The new legal doctrine held that speech could not be banned unless the harm was imminent or the danger was probable.

- However, although judges eventually recognized and codified this shift, they did not cause it. Instead, the shift was the result of political activity, organized around a series of famous free speech battles during the Civil War and World War I, and played out in Congress before it was ratified in the courts. From the 18th century until the New Deal, the primary defense for free speech was a popular one—namely, the ability of juries to decide whether the speech was true or intended to incite violations of the law.

- The galvanizing free speech battles of the Civil War era involved the effort by Southern states to suppress the right of abolitionists to criticize slavery. In the late 1830s, the murder of Elijah Parish Lovejoy, an abolitionist newspaper editor in Illinois, inflamed Northern opinion and helped reframe the Southern assault on free speech as a threat to all Northerners—not just to abolitionists.

- As a result of the Lovejoy incident (and of Southern demands that Congress refuse to accept antislavery petitions), preachers, newspapers, and citizens throughout the North condemned mob violence, and public opinion shifted toward the abolitionists. The Lovejoy affair also helped to turn Northern opinion against the "bad tendency" test, which increasingly seemed inadequate to protect free speech.

- In the 1830s, Southern states had passed a series of laws banning speech whose "tendency" was to incite slave rebellions. Like the Sedition Act, these prohibitions were not limited to publications that directly advocated crimes or insurrection; instead, any abolitionist criticism that had a tendency to incite bad behavior was banned, and those who circulated it were threatened with the death penalty. However, unlike the Sedition Act, the Southern laws did not even

allow the truth of the criticism as a defense against liability—a defect noted by Northern critics after Lovejoy's murder.

- During the first congressional campaign after the Civil War, Republicans complained about the Southern denial of free speech as a paradigmatic violation of the fundamental rights of American citizens, and these complaints influenced Congress's debates over the proposed Fourteenth Amendment to the Constitution, which prohibited states from violating the "privileges or immunities of citizens of the United States." In proposing the Fourteenth Amendment, Republicans reaffirmed the position they had staked out during the congressional and presidential campaigns of 1856: that free speech was one of the privileges or immunities of citizenship, and it should be protected from infringements by the states as well as Congress.

- Unfortunately, for 50 years after the ratification of the Fourteenth Amendment, judges refused to enforce the robust view of free speech that the Reconstruction Republicans attempted to embrace. From the Civil War until World War I, most judicial decisions continued to allow the suppression of free speech based on its purported bad tendency, often by ignoring free speech challenges.

- It took yet another series of political controversies—focusing on the rights of dissenters during and after World War I—to persuade the Supreme Court to repudiate the bad tendency test in 1937. Even during these controversies, however, Congress and civil libertarian activists, rather than the courts, took the lead in debating the constitutional parameters of free speech. In 1917, for example, the Wilson administration tried to exploit antiwar sentiment by urging Congress and the courts to suppress political dissent based on its purported bad tendencies.

- In debates over the Espionage Act of 1917, Congress took its constitutional responsibilities seriously and rejected some of the most draconian provisions proposed by Wilson, including one that would have allowed the president to censor the press. Because of

free speech scruples, another provision that allowed postmasters to exclude from the mails any writing of a "treasonable or anarchistic character" was refined so that it only banned speech expressly "advocating or urging treason, insurrection or forcible resistance to any law of the United States." This refinement represented an explicit congressional attempt to renounce the bad tendency test and to replace it with an express advocacy test that was more protective of free speech.

- Despite Congress's attempts to protect free speech by refining the Espionage Act, lower court judges tended to construe the act very broadly, stretching it to prohibit speech that had a "bad tendency" rather than requiring the evidence of express advocacy of unlawful conduct that Congress had demanded. When Judge Learned Hand tried to repudiate the bad tendency test, his opinion was reversed by Justice Oliver Wendell Holmes, who had endorsed the bad tendency test in 1907 and embraced it again in unanimous opinions upholding Espionage Act convictions in March 1919.

- In the *Schenck* case, Holmes upheld the conviction of Charles Schenck, who had circulated a pamphlet insisting that the draft was unconstitutional. In the *Debs* case, he upheld the conviction of Eugene V. Debs, the Socialist candidate for president in 1908, 1912, and 1920 who had expressed his support of three Socialists imprisoned for violating the Espionage Act.

- However, Holmes ultimately changed his mind. Holmes converted his "clear and present danger" test from an invitation to suppress free speech into a shield for its protection. In the *Abrams* case, decided in 1919, in which the Court upheld the conviction—and sentences of up to 20 years—of Russian immigrants for distributing leaflets protesting the deployment of U.S. troops to Russia, Holmes wrote a memorable dissent, joined by Justice Louis Brandeis, about the meaning of the First Amendment.

Holmes, Brandeis, and Breyer

- Holmes's libertarian defense of free speech as the cornerstone of the marketplace of ideas was consistent with his nihilistic vision of American democracy. In addition to his deep skepticism about the outcome of democratic debates, Holmes seemed to suggest in the *Gitlow* (1925) opinion that political dissent could be protected only when it was unconvincing and could be punished whenever it was likely to produce any imminent harm—no matter how trivial. Brandeis joined Holmes's famous dissents.

- However, in the *Whitney* case, Brandeis specified more precisely the legal conditions under which subversive advocacy could be suppressed. At the same time, he provided a more creative and more optimistic justification for protecting free expression in a democracy. In his concurring opinion, Brandeis refined Holmes's clear and present danger test in crucial ways.

- Brandeis's insight that speech could only be restricted if it threatened harms that were both imminent and serious finally came to define the parameters of free speech in America when the Supreme Court overturned *Whitney* more than 40 years later in the *Brandenburg* case of 1969. Today, it is the principal barrier in America against the prosecution of hate speech and other dignitary injuries that European courts have come to take for granted.

- On the Roberts Court, Justice Stephen Breyer has attempted the most sustained defense of a pragmatic vision of free speech, rooted in the republicanism of the ancient Greeks and Romans, since Brandeis's opinion in *Whitney*. In his book *Active Liberty*, Breyer, citing not Brandeis but Benjamin Constant, the Swiss political philosopher of the enlightenment era, argues that judges should consider the effects of their decisions in promoting not only the negative "liberty of the moderns" but also the active "liberty of the ancients."

- In his book, Breyer writes: "Liberty means not only freedom from government coercion but also the freedom to participate in

government itself"—in particular, the freedom to participate in robust public deliberation.

- Like Brandeis, Breyer understands the First Amendment as "protecting more than the individual's modern freedom." In his view, constitutional protections for free speech seek to encourage "a conversation among ordinary citizens that will encourage their informed participation in the electoral process." Whether Breyer's vision of free expression will gain any more adherents than Brandeis's original vision remains to be seen, but as new communications technologies are transforming our debates about free expression, Brandeis's vision seems more prescient than ever.

Suggested Reading

Breyer, *Active Liberty*.

Stone, *Perilous Times*.

Questions to Consider

1. Imagine that you are a juror in the trial of John Peter Zenger. You believe he is guilty of the crime of seditious libel, but you also think that punishing people for seditious libel violates their rights of free speech. Would you vote to nullify—or ignore—the law and acquit Zenger, or would you vote to convict him regardless of your personal views?

2. Justice Oliver Wendell Holmes believed that the purpose of the First Amendment was to protect the marketplace of ideas so that strong ideas could triumph over weak ones. Justice Louis Brandeis believed that the purpose of the First Amendment was to make citizens free to develop their faculties of deliberation and discussion so that they could achieve a shared understanding of the truth. Which view do you find more convincing? Why?

From WikiLeaks to the Arab Spring

Lecture 21

The principle that free speech can't be banned unless it poses an imminent threat of provoking serious illegal activity called into question the constitutionality of convicting critics of World War I, for example, under the federal Espionage Act. However, threats of Espionage Act prosecutions have hardly disappeared. More recently, they have been resurrected by the scandal surrounding WikiLeaks. In this lecture, you will learn about the legal and policy issues raised by WikiLeaks, which reveal dramatic tensions between protecting free speech and protecting privacy. In addition, you will learn about current controversies involving offensive speech.

WikiLeaks and the Espionage Act

- WikiLeaks is a website that was founded in 2006 by Julian Assange, an Australian activist and computer programmer who believes that government and corporate information should be completely transparent. Earlier on, it made a splash by publishing documents about toxic waste dumping in Africa, the military procedures for the detention camp at Guantanamo Bay, and e-mails from one of Sarah Palin's personal accounts.

- WikiLeaks has been a platform for both whistleblowers and indiscriminate document dumps. In 2010, WikiLeaks also released about 250,000 State Department diplomatic cables, provoking anger and criticism from the diplomatic corps. The release of the documents led to strained diplomatic relations because the State Department was forced to warn foreign officials of the potential for sensitive disclosures, and foreign diplomats and sources worried that the United States could not protect sensitive communications.

- In 2011, WikiLeaks published more than 130,000 of the leaked diplomatic cables in completely uncensored form, reversing its policy of controlled releases and redacting certain types of

sensitive information. Some of the documents showed the names of foreigners who had spoken confidentially to U.S. diplomats and whose identities were marked in the cables with the designation "strictly protect." State Department officials and human rights activists expressed concern that such sources, including legislators, activists, journalists, and academics in authoritarian countries, now faced dangers such as dismissal from their jobs, prosecution, or violence.

- Bradley Manning was an Army intelligence analyst who has been charged with leaking to WikiLeaks more than 260,000 diplomatic cables, more than 90,000 intelligence reports on the war in Afghanistan, and a video of a military helicopter attack.

- After WikiLeaks began to release sensitive U.S. government information, it faced severe backlash. The refusal of credit card companies to process online donations to WikiLeaks proved a crippling blow, and WikiLeaks has receded from prominence as a source of new information—although its past releases remain available online.

- More troubling are calls on the American government to prosecute Assange under the federal Espionage Act of 1917, which makes it unlawful to willfully transmit "information respecting the national defense … to any person not entitled to receive it" that "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation." However, the Espionage Act has historically only been successfully applied to leakers, not publishers of leaks, and there was no principled way to prosecute WikiLeaks for its indiscriminate document dumps without also ensnaring legitimate journalists.

- In the U.S. constitutional tradition, moreover, speech can only be banned if it threatens to provoke serious and imminent violence or lawless action—a standard that WikiLeaks did not come close to meeting. Regardless, the search for a legal punishment for WikiLeaks persists. The Justice Department is still exploring

possible grounds for prosecuting Assange as a coconspirator who actively solicited Manning's leak and subpoenaed Twitter for records of WikiLeaks' followers.

- Senator Joseph Lieberman, along with Republicans John Ensign and Scott Brown, has called for the Espionage Act to be amended in order to allow for the prosecution of WikiLeaks. Lieberman has emerged as the politician who has threatened free speech more stridently than anyone since Woodrow Wilson's attorney general, who used the Espionage Act to prosecute and deport suspected radicals after World War I. In addition to urging an unconstitutional crackdown on WikiLeaks itself and pressuring Amazon to stop hosting the site, Lieberman has also implied that media organizations might be punished for publishing details of the cables.

- However, although Lieberman was wrong to push for a legal vendetta against WikiLeaks, he was not wrong to deplore it. To the degree that WikiLeaks was a platform for indiscriminate document dumps, it threatened to violate privacy rights and democratic deliberation. WikiLeaks has published a handful of leaks in the public interest, but only a fraction of its leaks can be considered whistleblower documents that expose wrongdoing, criminal activity, abuse of authority, or the waste of public resources. Instead, the vast majority of the leaks involve the routine records of governmental operations, and by revealing them, WikiLeaks is attacking the entire notion of government secrecy.

- Without secrecy, military operations, intelligence activities, and diplomatic communications are difficult to sustain. Of course, secrecy should have limits, but by advocating for extreme transparency, WikiLeaks has embraced the position that secrecy is always illegitimate—a view that doesn't acknowledge that certain forms of disclosure can result in terrible injustice.

- Indeed, unlike responsible publishers, WikiLeaks lacks not only editorial judgment; it has often abdicated any editorial function at all. Even Assange's claim to value transparency above all collapses

under scrutiny. In the conflict in Afghanistan, for example, WikiLeaks has exposed the military secrets of Western countries but not those of the Taliban. Assange's actions suggest that he is less interested in exposing corruption worldwide than in undermining the U.S. government.

- Although prosecuting WikiLeaks is neither feasible nor wise, that doesn't mean that there is nothing to be done about its most extreme methods. Media organizations, for example, could refuse to work with WikiLeaks in its current form. Instead, they might embrace a model proposed by a group of disaffected WikiLeaks staffers who recently announced the formation of a splinter organization called OpenLeaks, which will not publish any documents but will instead serve as a conduit that allows anonymous sources to deposit leaked information in a secure drop box and then designates news organizations to determine whether the information is newsworthy and to subject it to fact-checking as well as redaction where necessary.

- If there's any doubt about the folly of prosecuting WikiLeaks under the Espionage Act, consider the fact that most recent Espionage Act prosecutions have failed. The act has rarely been used to prosecute leakers and whistleblowers. The first modern prosecution was that of Daniel Ellsberg in 1973—based on his leak of the Pentagon Papers in 1971, which exposed misinformation and atrocities during the Vietnam War—but the case was dropped due to prosecutorial misconduct.

- In 2010, former National Security Agency (NSA) employee Thomas Drake was charged with violating the Espionage Act, leaving him facing up to 35 years in prison. Drake's case was one of six that have been pursued by the Obama Administration over leaks—more than have been pursued in all prior administrations combined.

Offensive Speech

- In addition to questions involving WikiLeaks and the Espionage Act, the most hotly contested free speech controversies today involve efforts to suppress offensive speech. Since the 1970s, the Supreme

Court has held consistently that speech can't be prosecuted unless it's likely to provoke an immediate violent reaction. In the 1971 case *Cohen v. California*, the Court considered the constitutionality of a law that prohibited speech on the basis that it was "offensive," thereby breaching the peace.

- Cohen had gone into the Los Angeles County courthouse wearing a jacket that used an expletive to describe the draft. The California courts had upheld Cohen's conviction because it was "reasonably foreseeable" that the words on Cohen's jacket would cause someone to fight him or attempt to forcibly remove his jacket. The Supreme Court reversed this ruling, holding that Cohen's speech did not constitute "obscenity" because it was not a sexual message and did not rise to the level of "fighting words" because they were not directed at a particular person or group and were not "inherently likely" to provoke an immediate violent reaction from a listener.

- In his opinion, Justice John Marshall Harlan stressed that by banning certain "vulgar" words, governments could effectively prevent people from expressing certain ideas, which would be inconsistent with the First Amendment. The *Cohen* case signaled that the Court has moved away from the "fighting words" doctrine, which presumed that there were certain types of statements that when directed toward a person, would tend to provoke an immediate violent response.

- In the 2011 case of *Snyder v. Phelps*, eight justices of the Supreme Court ruled that the hateful words of members of the Westboro Baptist Church displayed on signs at military funerals, although deeply offensive, were protected by the First Amendment. Only Justice Samuel Alito would have allowed the speech to be prosecuted on the grounds that it constituted fighting words.

- The Supreme Court returned to the issue of student speech in *Morse v. Frederick*, in which a school disciplined a student for unfurling a pro-drug banner at a school-sponsored event. The Court first rejected an argument that this was not a "school speech case," being careful

to note that it occurred during normal school hours at a school-sanctioned and school-sponsored event. The Court acknowledged the "uncertainty at the outer boundaries as to when courts should apply school speech precedents" but found this case clear. Nonetheless, the Court did not apply *Tinker*, but instead relied on the government's compelling interest in combating student drug abuse.

- Supreme Court student speech precedent is clear: Public schools only have authority to suppress student speech that occurs on-campus or at school-sponsored events. Off-campus student speech is outside the reach of school authorities, but the Internet is challenging the distinction between what is on and off campus.

The Power of the Internet

- Although courts are focused on the limits of the government's attempts to suppress offensive speech, they have less influence over who can speak and be heard today than the guardians of the networks at Google and Twitter.

- The flowering of the Arab Spring in 2010 led to a series of enthusiastic paeans to the democracy-promoting tendencies of the Internet. The Arab Spring began when Mohamed Bouazizi, a 26-year-old Tunisian street vendor, set himself on fire on December 17, 2010, to protest corrupt local police and authorities. Following his death, protests spread across Tunisia and the Internet. Protestors posted videos of unrest while the government fought back with censorship and hacking. By January 14, Tunisian President Ben Ali's 23 years in power were over.

- Social media, however, was not at the center of the Tunisian revolution. In Tunisia, television remains the dominant medium. People are poor, and only 20 percent use the Internet while only five percent use Facebook. In contrast, television reaches more than 80 percent of the population. The technologies could be integrated, however, as television stations often repurposed and rebroadcast material from Internet sources.

- In Egypt, a Facebook page called for a day of protest on January 25, 2011, after police officers dragged a 28-year-old man from an Internet café and beat him to death. Over 80,000 people signed up for the protest on Facebook, and the protest continued in Egypt despite a government shutdown of Egypt's Internet and cellular phone service for several days. On February 11, Egyptian President Hosni Mubarak was driven from office after 30 years.

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During the Arab Spring, efforts were made by repressive governments to shut off the Internet entirely.

- In Egypt and Tunisia—as well as in Libya, where the 42-year reign of Muammar Gaddafi was ended in 2011 after mass protests led to civil war—most sharing of information was done through text, video, and picture messaging over cellular phone networks rather than on the Internet.

- Twitter and Facebook were the most visible faces of the Arab Spring for many international outsiders, however, so those tools have been given a lot of the credit. Perhaps the most important source of information in the Arab Spring was the Al Jazeera television network, which has taken a stance of expansive willingness to broadcast events, leading to a broader dissemination of information than when there was only state television.

- The primary role of social networks in the Arab Spring seems to have been allowing young, technology-proficient activists to quickly organize and plan demonstrations that later built momentum and gained popular support. The Tunisian and Egyptian governments took different approaches to combating these tools. Tunisia was afraid of completely cutting off Internet services, so

it targeted specific sites; Egypt, on the other hand, ordered all of its major telecommunications providers to suspend operations.

- While the Tunisian approach was eventually circumvented by protestors using technologies like IP proxy servers, virtual private networks (VPNs), and Google's voice-to-Twitter applications, the Egyptian approach effectively crippled the nation's economy and even led to a lowering of Egypt's debt rating.

Suggested Reading

Mayer, "The Secret Sharer."

Morozov, *The Net Delusion*.

The New York Times, Open Secrets.

Questions to Consider

1. Discuss WikiLeaks. Do you believe that it deserves credit for allowing whistleblowers to expose abuses, or was it simply a platform for unedited document dumps that threatened privacy and national security? If you think that WikiLeaks violated privacy and national security, do you think that it should be legally prosecuted?

2. Do you believe that social media played a role during the Arab Spring of spreading democracy and toppling dictators?

Google, Facebook, and the First Amendment

Lecture 22

As more and more speech migrates online to blogs and social networking sites, the ultimate power to decide who has an opportunity to be heard, and what they may say, lies increasingly with Internet service providers, search engines, and other Internet companies like Google, Yahoo!, and Facebook. In this lecture, you will learn about how these companies exercise their new power over free speech. In addition, you will examine one of the most important regulations that the government is considering in response—a regulation known as network neutrality.

Google and Yahoo!

- When Google was founded, in 1998, it wasn't at all obvious whether the proprietors of search engines would obey the local laws of the countries in which they did business—and whether they would remove links from search results in response to requests from foreign governments.

- This began to change in 2000, when a French Jew surfed a Yahoo! auction site to look for collections of Nazi memorabilia, which violated a French law banning the sale and display of anything that incites racism. After a French judge determined that it was feasible for Yahoo! to identify 90 percent of its French users by analyzing their IP addresses and to screen the material from the users, he ordered Yahoo! to make reasonable efforts to block French users from accessing the prohibited content or else to face fines and the seizure of income from Yahoo!'s French subsidiary. In January 2001, Yahoo! banned the sale of Nazi memorabilia on its websites.

- The *Yahoo!* case made clear that search engines like Google and Yahoo! could be held liable outside the United States for indexing or directing users to content after having been notified that it was illegal in a foreign country. In the United States, by contrast, Internet service providers are protected from most lawsuits involving having

hosted or linked to illegal user-generated content. As a consequence of these differing standards, Google has considerably less flexibility overseas than it does in the United States about content on its sites, and its "information must be free" ethos is being tested abroad.

- For example, on the German and French default Google search engines, Google.de and Google.fr, you can't find Holocaust-denial sites that can be found on Google.com because Holocaust denial is illegal in Germany and France. In the wake of the *Yahoo!* decision, Google decided to comply with governmental requests to take down links on its national search engines to material that clearly violates national laws.

- Initially, Google's policy of removing links to clearly illegal material on its foreign search engines seemed to work, but things changed significantly after Google bought and expanded YouTube in 2006. Once YouTube was available in more than 20 countries and in 14 languages, users began flagging hundreds of videos that they saw as violations of local community standards, and governments around the globe demanded that certain videos be blocked for violating their laws.

- Google's solution was similar to the one the French judge urged on Yahoo!: It agreed to block users in a particular country from accessing videos that were clearly illegal under local law. However, that policy still left complicated judgment calls in murkier cases.

- The volume of videos posted on YouTube is formidable; Google estimates that approximately 24 hours of content are uploaded every minute. YouTube users can flag a video if they think it violates YouTube's community guidelines, which prohibit sexually explicit videos, graphic violence, and hate speech. Once flagged, a video is vetted by YouTube's internal reviewers at facilities around the world—who decide whether to take it down, leave it up, or send it up the YouTube hierarchy for more specialized review.

International Response to the Internet

- Over the past few years, Google and its various applications have been blocked, to different degrees, by 24 countries. Meanwhile, governments are increasingly pressuring telecom companies like Comcast and Verizon to block controversial speech at the network level. Europe and the United States recently agreed to require Internet service providers (ISPs) to identify and block child pornography, and in Europe, there are growing demands for network-wide blocking of terrorist-incitement videos.

- As a result, Nicole Wong, Google's deputy general counsel who used to hold the "decider" role at Google—which allowed her to decide what controversial user-generated content went down or stayed up on YouTube and other applications owned by Google—worried that Google's ability to make case-by-case decisions about which links and videos are accessible through Google's sites may be slowly circumvented, as countries are requiring the companies that give people access to the Internet to build top-down censorship into the network pipes.

In 2006, Google discovered that the Turkish government had blocked access to YouTube for virtually all Turkish Internet users.

- It is not only foreign countries that are eager to restrict speech on Google and YouTube. In May of 2006, Senator Joseph Lieberman had his staff contact Google and demand that the company remove from YouTube dozens of what he described as "jihadist videos." After viewing the videos one by one, Wong and her colleagues removed some of the videos but refused to remove those that they decided didn't violate YouTube guidelines. Lieberman was not satisfied.

- Then, Google and YouTube announced new guidelines prohibiting videos "intended to incite violence"—a category that scrupulously tracks the Supreme Court's rigorous First Amendment doctrine, which says that speech can be banned only when it poses an imminent threat of producing serious lawless action.

- In November of 2010, YouTube added a new category that viewers can click to flag videos for removal: "promotes terrorism." Although hailed by Senator Lieberman, the new category is potentially troubling because it goes beyond the narrow test of incitement to violence that YouTube had previously used to flag terrorism-related videos for removal. YouTube's capitulation to Lieberman shows that a user-generated system for enforcing community standards will never protect speech as scrupulously as unelected judges enforcing strict rules about when speech can be viewed as a form of dangerous conduct.

- Google remains a better guardian for free speech than Internet companies like Facebook and Twitter, which have refused to join the Global Network Initiative, an industry-wide coalition committed to upholding free speech and privacy. However, the recent capitulation of YouTube shows that Google's "trust us" model may not be a stable way of protecting free speech in the 21st century, even though the alternatives to trusting Google might protect less speech than Google's "decider" model currently does.

- Google isn't alone in having a free speech decider: Facebook and Twitter have appointed people with similar responsibilities over what content stays up and what must come down. As a result, the deciders at Google, Facebook, and Twitter arguably have more influence over the contours of online expression than anyone else on the planet.

Apple's Apps and Network Neutrality

- Google's Nicole Wong suggested that her role was unsustainable because the nature of the Internet means that it will eventually become too big to control. However, users may not always interact

with content through browsers, as they have largely done in the past. Apple's iOS, which runs on the iPad and iPhone, relies on a different model: the app, which delivers content according to the wishes of the developer rather than the user. The app model creates new threats of censorship—with iOS being a case in point.

- In 2010, Apple released its rules governing all content that can be used on iPads and iPhones. In the guidelines, Apple makes clear that it aggressively oversees apps. Apple reserves the right to reject apps that it doesn't find useful or creative. Apple bans apps that are "defamatory, offensive, mean-spirited, or likely to place the targeted individual or group in harm's way" but makes an exception on offensive or mean-spirited content for professional political satirists and humorists. Apple bans apps that are excessively crude or designed to upset or disgust users and any form of pornography.

- The best way to ensure that Apple and other providers don't use their economic might to suppress speech by disfavoring their competitors is a regulation proposed by the Federal Communications Commission (FCC) called network neutrality. The essence of net neutrality seems simple: Internet service providers should be required to treat all data equally and avoid blocking or delaying any sites or applications. Net neutrality proponents argue that while Internet service providers can charge you different prices based upon the speed of your service and volume of your use, they should not be able to discriminate against any form of use or content, either by completely blocking it or by making it less accessible than other content.

- In 2005, the FCC issued a policy statement that generally promoted network neutrality but made clear that only "lawful" content and activities should be protected and that the principle must, at times, yield to law enforcement needs. At present, the FCC's policy statement is nonbinding.

- However, in 2010, Google and Verizon entered into an agreement on network neutrality, adopting the FCC principles in the context of broadband Internet providers like Comcast. Google and Verizon

opposed network neutrality for wireless networks like Verizon, AT&T, and Sprint—all of which run on Apple smartphones—reasoning that the wireless infrastructure is still being developed.

- Net neutrality is an important principle to establish because there are, unfortunately, cases where it has been violated—cases where network operators have censored speakers who threatened their economic interests. AT&T and Verizon have both violated network neutrality, suppressing issues-oriented, but otherwise legal, messages on politics and abortion.

- In 2007, Comcast, which is now America's largest high-speed Internet provider, blocked BitTorrent, a popular peer-to-peer file-sharing application that could be used to distribute (among many other things) high-definition TV video that would compete with Comcast's video services. After initially denying that it was blocking BitTorrent, Comcast claimed that it wasn't blocking the file-sharing application but merely delaying it to conserve bandwidth as part of "reasonable network management."

- The *Comcast* case is a model for the free speech battles of the future, where Internet and wireless providers may want to favor certain content providers over others in order to maximize profits at the expense of consumer choice. This problem is especially acute in the United States because of our lack of competition among broadband companies in most markets.

- We now live in a world where the technology for watching what people do with their data packets is sophisticated enough to give a company like Comcast the ability to decide which packets can be shuffled into slower or faster traffic lanes, depending on what its business model dictates. In addition to having the technical ability to discriminate, Internet providers now have the legal authority to do so. In the 2005 *Brand X* decision, the Supreme Court ruled that cable broadband providers were not a "telecommunications service" but an "information service" and, therefore, were freer to keep competitors off the network.

- If Comcast, a private company, is blocking a particular technology, rather than discriminating against particular speakers, there's no state action and no obvious peg for a First Amendment lawsuit. That's why the FCC is crucial to shaping the future of free speech. Under the net neutrality principles proposed by Julius Genachowski, the chairman of the FCC, broadband operators like Comcast can't "discriminate against particular Internet content or applications" and will have to be transparent about their network-management practices.

- The most controversial part of Genachowski's proposal is the extension of network-neutrality principles from broadband cable providers, like Comcast, to mobile broadband networks, like AT&T, Verizon, and Sprint—a move that places the FCC in the thick of a whole range of thorny questions involving both economic discrimination and free speech.

- Apple has denied blocking Google Voice, the e-mail and phone management tool, but asserts the right to block applications that might threaten traffic management. When Steve Jobs introduced the iPhone, he made clear that it wouldn't be open to all applications—to avoid viruses or huge demands for bandwidth that might threaten the user's Internet experience. Google's Android mobile operating system is based on the opposite model: an open platform for development, accessible to all hardware and software applications.

- There are, of course, huge financial stakes in the competition between Apple and Google. Supporters of net neutrality include not only Google, but also other companies that want to ensure that their services, such as Amazon and Skype, are as widely available as possible. Opposing net neutrality are, of course, telecoms like AT&T and Verizon, which want to set their own prices and choose which devices run on their networks. The battle will be played out in the courts—where net neutrality opponents will argue that the FCC has no authority to regulate wireless devices—and in Congress, which could pass a law denying the FCC regulatory authority.

Suggested Reading

Rosen, *"The Deciders."*

———, *"Google's Gatekeepers."*

Wu, *The Master Switch*.

Questions to Consider

1. Do you think that the "deciders" at Google and Facebook have too much power over decisions about which videos and posts are taken down from the web? Can you imagine a better way of protecting free speech? Should governments regulate the deciders to ensure that they are applying neutral, professional standards about controversial content?

2. Google decided not to remove the anti-Mohammed video *The Innocence of Muslims* in most countries around the world, even after it provoked violence in Libya and Egypt, because the deciders concluded that it didn't violate YouTube's terms of service, which prohibit insulting a religious group but not a religious leader. However, the company did temporarily block the video in Libya and Egypt themselves, due to the "difficult situation" in those countries. Do you think this was the right decision? Imagine that you are one of the Google deciders. How would you have decided?

The Right to Be Forgotten

Lecture 23

The most dramatic clash between privacy and free speech of the 21st century involves the attempt by the European Union to constrain Google and Facebook by creating a sweeping new right called the right to be forgotten. Unless the right is defined more precisely, it could precipitate a dramatic clash between European and American conceptions of the proper balance between privacy and free speech, leading to a far less open Internet. In this lecture, you will learn about the international debate over the right to be forgotten. In addition, you will consider hotly contested battles over the future of intellectual property online.

The Right to Be Forgotten

- Consider the case of Virginia da Cunha, the Argentinean pop star who posed for racy pictures that found their way to the Internet. Then, thinking better of her decision, she sued Google and Yahoo! Argentina, demanding that they take the pictures down. An Argentinean judge sided with da Cunha after invoking a version of a new right that is sweeping Europe: the right to be forgotten.

- The judge then fined Google and Yahoo! and ordered them to delink all sites with racy pictures that included her name. Claiming that removing only selected pictures was too difficult, Yahoo! decided to block all sites even referring to da Cunha from its Argentinean search engine. The court's decision was eventually overturned on appeal—on the grounds that Google and Yahoo! could only be held liable if they knew content was defamatory and negligently failed to remove it.

- Soon, citizens around the world may have the ability to selectively delete themselves from the Internet. At the beginning of 2012, Viviane Reding, the European commissioner for justice, fundamental rights, and citizenship, proposed codifying a broad version of the right to be forgotten in European data-protection law.

Although Reding depicted the new right as a modest expansion of existing data privacy rights, it in fact represents the biggest threat to free speech on the Internet in the coming decade.

- The right to be forgotten could make Facebook and Google, for example, liable for up to one percent of their global income (in Google's case, that's almost $40 billion) if they fail to remove photos that people post about themselves and later regret, even if the photos have been widely distributed already.

- In theory, the right to be forgotten addresses an urgent problem in the digital age: It is very difficult to escape your past on the Internet now that every photo, status update, and tweet lives forever in the cloud. However, Europeans and Americans have diametrically opposed approaches to the problem.

- In Europe, the intellectual roots of the right to be forgotten can be found in French law, which recognizes *le droit à l'oubli*—or "the right of oblivion"—a right that allows a convicted criminal who has served his or her time and has been rehabilitated to object to the publication of the facts of his or her conviction and incarceration. In America, by contrast, publication of someone's criminal history is protected by the First Amendment.

- European regulators believe that all citizens face the difficulty of escaping their past now that the Internet records everything and forgets nothing—a difficulty that used to be limited to convicted criminals.

- Since Facebook and other social networking sites already allow people to delete photos and other data that those people have posted themselves, creating a legally enforceable right is mostly symbolic and entirely unobjectionable. As proposed, the European right to be forgotten would also usefully put pressure on Facebook to abide by its own stated privacy policies by allowing users to confirm that photos and other data have been deleted from its archives after they are removed from public display.

- According to the proposed European right to forget, when someone demands the erasure of personal data that others have copied from him or her and posted, an Internet service provider "shall carry out the erasure without delay," unless the retention of the data is "necessary" for exercising "the right of freedom of expression," as defined by member states in their local laws. In another section, the regulation creates an exemption from the duty to remove data for "the processing of personal data solely for journalistic purposes, or for the purposes of artistic or literary expression."

- Essentially, this puts the burden on Facebook to prove to a European commission authority that someone else's publication of a person's embarrassing picture is a legitimate journalistic (or literary or artistic) exercise. The prospect of ruinous monetary sanctions for any data controller that "does not comply with the right to be forgotten or to erasure"—a fine up to one million euros or up to two percent of Facebook's annual worldwide income—could lead data controllers to opt for deletion in ambiguous cases, producing a seriously chilling effect.

- For a preview of just how chilling that effect might be, consider the fact that the right to be forgotten can be asserted not only against the publisher of content (such as Facebook or a newspaper), but also against search engines like Google and Yahoo! that link to the content.

- Takedown requests involving posts that someone else posts about a person raises the most serious concerns about free expression. The U.S. Supreme Court has held that states cannot pass laws restricting the media from disseminating truthful but embarrassing information—as long as the information was legally acquired. Generally, American judges hold that if you disclose something to a few people, you can't stop them from sharing the information with the rest of the world.

Reputation Bankruptcy

- Jonathan Zittrain of Harvard Law School says that people should be allowed to declare "reputation bankruptcy" every 10 years or so, wiping out certain categories of ratings or sensitive information. His model is the Fair Credit Reporting Act, which requires consumer-reporting agencies to provide you with one free credit report per year—so that you can dispute negative or inaccurate information—and prohibits the agencies from retaining negative information about bankruptcies, late payments, or tax liens for more than 10 years.

- Another proposal, offered by Paul Ohm, a law professor at the University of Colorado, would make it illegal for employers to fire or refuse to hire anyone on the basis of legal off-duty conduct revealed in Facebook postings or Google profiles.

- Another legal option for responding to online setbacks to your reputation is to sue under current law. There's already a sharp rise in lawsuits known as Twittergation—suits to force websites to remove slanderous or false posts. However, even if you win a U.S. libel lawsuit, the website doesn't have to take the offending material down any more than a newspaper that has lost a libel suit has to remove the offending content from its archive. Some scholars, therefore, have proposed creating new legal rights to force websites to remove false or slanderous statements.

- However, many people aren't worried about false information posted by others; they're worried about true information they've posted about themselves when it is taken out of context or given undue weight. The most promising solutions to this problem may be not legal but technological ones, such as expiration dates for data.

- Common Sense Media, a digital watchdog group, has proposed an "eraser button," which would allow parents to require companies to permanently delete any data their children had put online but later regretted. Commentators have noted the similarity between the proposed eraser button and the right to be forgotten, but the eraser button poses less of a threat to the free speech of others.

Intellectual Property Rights

- In addition to the right to be forgotten, the most hotly pitched legal battles over digital free speech today involve intellectual property. In 1998, Congress passed the Digital Millennium Copyright Act (DMCA), which requires websites to remove content that supposedly infringes intellectual property rights after receiving a complaint. It effectively gave Hollywood lobbyists the power to control the design of entertainment devices as long as they linked new technologies with particular digital rights management systems. This is why DVDs won't let you fast-forward through commercials.

The Digital Millennium Copyright Act requires websites to remove content that infringes intellectual property rights.

- The Online Copyright Infringement Liability Limitation Act (part of the DMCA) imposes liability on intermediaries when they contribute to infringement. The act gives online service providers a safe harbor from liability if, upon receiving notice of allegedly infringing material, they act expeditiously to remove the purported infringing material.

- The low barrier to filing a takedown request creates a tremendous potential for abuse. In addition, a notice and takedown regime carries significant speech-chilling potential: Merely by alleging that a YouTube video contains copyrighted material, for example, a company that is competing with the creator of the video can force YouTube to take the video down.

- The most controversial current battles over intellectual property involve Congress's efforts to expand protection. In 2011, Congress considered two laws: the Stop Online Piracy Act (SOPA) and the Protect IP Act (PIPA). The bills were intended to provide the

government with stronger powers to combat copyright infringement arising outside the United States, but they provoked a firestorm of online protests based on fears that they threatened free speech.

- SOPA and PIPA proposed to empower the government to cut off infringing sites from their U.S.-based funding. The legislation also proposed to modify the Domain Name System, a crucial service that underpins the Internet and allows computers to locate each other reliably around the world.

- In January 2012, some websites coordinated a protest against SOPA and PIPA, including posting statements of opposition or temporarily making some or all content accessible. By January 20, 2012, the political environment regarding both bills had shifted significantly, and the bills were shelved.

- Both the SOPA in the House and the PIPA in the Senate were heavy-handed and indefensible attempts to shut down a handful of rogue pirate sites by changing the open structure of the Internet. In allowing the Justice Department to force Internet service providers to block access to websites that "enable" pirated content, the proposed legislation would have posed serious threats to free speech.

The Real Issue

- The copyright wars aren't simply fights about the future of free speech; they're also battles about whether the financial interests of the new media will triumph over those of the old media—and if they do, it's not clear that the public interest will always be served. There are lawyers and lobbies on both sides of the debate, and neither side is devoted to the promotion of creativity for its own sake.

- Ultimately, it's too simplistic to see the copyright wars as a battle between idealistic tech companies that want information to be free and the greedy old media that wants to preserve a dying business model. Instead, as Robert Levine argues in his book *Free Ride: How Digital Parasites Are Destroying the Culture Business, and How*

the Culture Business Can Fight Back, the real battle is between two competing business models.

- On the one hand, there are the publishers, record companies, and movie companies that fund the content people want to watch and read. On the other hand, there are the tech companies, like Google and Facebook, that want to distribute content created with other people's money and sell more ads as a result. By destroying the business model that makes it possible for AMC to invest in excellent shows like *Mad Men*, Levine argues, the tech companies will create a digital wasteland dominated by self-produced cat videos.

- There's much to be said for Levine's analysis of the competing financial interests on both sides of the debate: The current system looks much better for the tech companies that distribute other people's content than for the old media companies that fund it, and to the degree that it's harder for artists and journalists to get paid for their work, the public may not benefit in the long run.

- What's still unclear—and is important to figure out—is how great a role Internet piracy is playing in destroying the business model that used to allow old media companies to invest in authors, musicians, and movie producers and support them over the course of a career.

- It's not obvious that online piracy is the major factor in allowing tech companies to distribute content for less than they pay for it. What we need, therefore, is more empirical research about the relationship between copyright enforcement and digital creativity.

- In the meantime, there are plenty of moderate alternatives to the unlamented SOPA and PIPA. The best solution, one that protects copyright without changing the architecture of the Internet, might lie in simple law enforcement. Because the number of commercial pirate sites operating overseas is small, tracking and identifying them and prosecuting them in cooperation with overseas police forces is a far more focused solution to the problem of Internet piracy than shutting down free speech for everyone.

Suggested Reading

Fleischer, "The Right to Be Forgotten."

Levine, *Free Ride*.

Rosen, "The Right to Be Forgotten."

Questions to Consider

1. What do you think of the European proposal to create a right to be forgotten on the Internet? Do you think people should have the right to remove photos they have posted that have been widely shared by others? What about truthful but embarrassing comments about themselves posted by others? In this clash between free speech and privacy, which side do you favor?

2. Should employers be prohibited from examining the Facebook pages of job applicants? Should universities be restricted from Googling applicants and examining their publicly available data—from Tweets to status updates? Should there be any restrictions on how we can be held accountable for material about ourselves that has been widely distributed on the Internet?

The Constitution in 2040

Lecture 24

In addition to teaching you some practical tips about protecting your privacy, this lecture will hopefully give you a sense of the importance of educating yourself about current controversies involving privacy, free speech, and property rights—and participating in national debates. Remember that the great advances for privacy and civil liberties came from the activism and engagement of American citizens. Most importantly, remember that the courts can't protect privacy, property, or free speech on their own; you as a citizen have an obligation to protect your own rights.

Constitutional Futurology

- Cases involving technological challenges to constitutional values are likely to grow over the coming decades. Although constitutional futurology is hardly an exact science, you can try to imagine the kinds of disputes that might arise over the next few decades.

- If the war against terror escalates, the government may deploy even more controversial forms of electronic surveillance, such as neuroimaging technologies that can detect the presence of electrochemical signals in the brain. The promoters of this "brain fingerprinting" say that it can detect brain waves that are consistent with particular kinds of recollection.

- In a murder case in Iowa, for example, a convicted murderer introduced an fMRI scan that suggested his brain did not contain information about the murder but did contain information consistent with his alibi. Under the Supreme Court's current cases, it is an open question whether fMRI scans, used as a glorified high-tech lie detector, would be considered a form of compulsory self-incrimination that violates the Fifth Amendment.

- If the justices viewed an involuntary brain scan as no more intrusive than a blood or urine sample or an ordinary fingerprint,

there wouldn't be any Fifth Amendment problem. However, if the Court decides that the fMRI scans are looking not merely for physical evidence but also for a suspect's memories and substantive consciousness, the justices might conclude that his or her mental privacy is being invaded and that he or she is being forced to testify against his or her will in a way that raises constitutional concerns.

- Imagine that police or counterterror experts in the future decide to search suspects for brain waves that suggest a propensity toward violence—a sort of cognitive profiling. These fMRI scans can show that the parts of the brain responsible for impulse control and empathy are underactive and those responsible for aggression and more animalistic, violent activities are overactive. In the future, suspects who show a propensity for violence might be detained indefinitely as enemy combatants, even though they have committed no crimes.

- Cognitive terrorist profiling seems more intrusive than brain fingerprinting deployed as a high-tech lie detector test. Still, it's not clear under current doctrine that even cognitive profiling violates the Fourth or Fifth Amendments, as conventionally understood. This means that the fate of fMRI technology—and in particular the difficult question of whether citizens or aliens can be detained based on their propensity to commit future crimes—may be debated and at least initially decided by elected representatives in Congress and the states.

- In addition to battles over the scope of privacy protected by the Fourth and Fifth Amendments, there will also be battles over the scope of personal autonomy protected by the Fourteenth Amendment. In *Roe v. Wade*, the Court said that the Fourteenth Amendment includes a right to privacy broad enough to protect a woman's decision to terminate her pregnancy.

- In coming decades, America's political and legal disputes about reproduction may well have moved far beyond efforts to balance the interest of a fetus against the interests of a pregnant mother.

Instead, the country will likely be debating the use of sophisticated technologies involving genetic manipulation and reproductive cloning outside the womb.

- Already, scientists are able to analyze the genetic makeup of embryos created through in vitro fertilization, using that information to help aspiring parents implant in the woman's womb only those embryos that display a specified range of desired characteristics—including not only sex but also, perhaps someday, intelligence, eye color, and height.

- In 1992, when the Supreme Court reaffirmed *Roe* in *Planned Parenthood v. Casey*, it held that the Constitution protects a right of personal autonomy. The scope of this right will be at the heart of disputes over genetic technologies in the future.

- In addition to genetic selection, another area of potential controversy is reproductive cloning. At the moment, there is no widespread clamor for the practice, although parents in the future may want to clone a terminally ill child. It's also not difficult to imagine a growing demand in the near future among same-sex couples for a way to produce children that are genetically related to both parents—something that reproductive cloning may be able to offer.

- It's certainly possible that Congress would be moved to ban noncoital reproduction, declaring that children shall only be conceived through the union of egg and sperm taken from an adult human. A bill along these lines would clash with the broad vision of personal autonomy endorsed by John A. Robertson and by Justice Anthony Kennedy. In the future, however, supporters of laws banning reproductive cloning might be able to call on conservative judges and legal scholars to make arguments for upholding the legislation.

- Just as some liberals insist that the constitutional right of personal autonomy guarantees a right of genetic selection, some social

conservatives are increasingly countering that the constitutional guarantee of equal protection of the laws should be interpreted to protect embryos from the moment of conception, including those that are destroyed in the process of generating stem cells. This view is squarely at odds with in vitro fertilization, as it is currently practiced.

- A final example involves what Edward Felten, a professor of computer science at Princeton University, has called a constitutional right to tinker. Felten had firsthand knowledge of how the threat of lawsuits can inhibit creativity: He and his colleagues were about to publish an academic paper about a set of anticopying technologies being considered by the record industry when a consortium of companies that had developed the technology threatened to sue the scholars for violating federal copyright law. As a result, Felten and his coauthors had to withdraw the paper (although they eventually won the right to publish it).

- Chastened by the experience, Felten tried to articulate what, exactly, is threatened when researchers aren't permitted to experiment without first consulting their lawyers. He hit upon the concept of tinkering. Whether the Supreme Court ever recognizes tinkering as a constitutional right, the ability to tinker may be threatened—not only in computer science but also in the life sciences as well. Genetic material is increasingly being patented, and many biologists worry that the tools they need in the lab to carry out research on genetic diseases may become entangled in patents.

- Efforts to patent the building blocks of life may not only raise difficult issues about scientific freedom; they may also ultimately force American society, and perhaps the Supreme Court, to debate the moral and constitutional issues raised by efforts to patent human life itself.

- The United States Patent and Trademark Office has announced that it won't issue patents on human beings because that would violate the constitutional prohibition on slavery and involuntary

servitude—but identifying what counts as a human being may be an increasingly challenging task. Confronted with patents on genetically enhanced dolphins with human IQs or sapient life forms that resemble human beings, legislatures will face tremendous pressure to intervene. The task of defining human life might be so politically explosive and embarrassing that Congress might ultimately prefer to punt the controversy over to the Supreme Court.

- There is precious little in the existing categories of constitutional discourse that would prepare the justices to identify the point at which an organism with a genetic sequence or artificial brain similar to a human deserves constitutional rights. Rather than presuming to define human life on their own, the justices would do better to defer to the definitions of elected legislatures or state initiatives—no matter how reluctant the political branches may be to address the question.

Encryption, password management, cookie blocking and tracking, account monitoring, and data backup are tools that can keep your digital data secure.

Practical Privacy Tips

Encryption

- As a technology user, there are many powerful tools at your disposal to encrypt your data and protect yourself against identity theft. Today, the reality is that even if governments or companies intercept or otherwise obtain encrypted data, they cannot feasibly crack encryption. Modern encryption techniques are so good that, if you encrypt something with today's best tools, it is quite likely that it won't even be crackable at any point in your lifetime if computing power continues to increase at its present rate.

- A best practice is to set up your device to automatically encrypt files placed in certain folders and develop a routine to place sensitive files in those folders so that nothing slips through the cracks. Remember also to make sure that if you use an external hard drive for backup, you should make sure to encrypt the data on the external drive as well. If you use cloud-based storage, either encrypt your data before uploading to the cloud or ensure that your storage provider uses good encryption.

Password Management

- Password management is especially important to protect yourself against identify theft. Given the difficulty of cracking encryption, cracking passwords is often seen as a simpler option.

- The security firm Symantec has several suggestions on proper password management.
    - Don't use proper names or English or foreign words (even spelled backward) in your password.
    - Don't use personal information, such as your or a family member's or pet's name, nickname, address, phone number, or birth date.
    - Make your password as long as possible and include uppercase and lowercase letters, numbers, and special characters.
    - Don't use the same password for multiple accounts.
    - If you must reveal your password to someone else, don't do it electronically.
    - If you must write down your password, keep it in a safe place, but try to only write down something to help jog your memory if you can.
    - Try to change your passwords three to four times per year.

Cookie Blocking and Tracking

- There are increasingly more options available for blocking and tracking the cookies that big data companies and advertisers use to monitor your web browsing activities and compile information about you. Several companies offer cookie blocking and cookie tracking software designed to let you know when sites are attempting to track you and to let you block cookies you don't want without limiting your ability to access other websites that use cookies. They can also apply a "do not track" header to tell websites that you don't want to be tracked.

- Although the Obama administration and Federal Trade Commission have urged companies to voluntarily comply with such requests, without further incentives, certainly not all companies will do so.

- It is also important to regularly install updates to your computer or device's software and also to use antivirus software to reduce your vulnerability to hacking intrusions, malware, and spyware that could compromise your privacy. Also, you can configure your browser not to allow third-party cookies or pop-up ads.

Account Monitoring

- Another important step that you can take to safeguard your privacy is to monitor your financial and social media accounts, your credit, and your online footprint. Many financial services providers offer instant notification of changes to your account and account settings, such as when a large withdrawal is made or when an address associated with the account is changed.

- You can also sign up for a legitimate credit reporting service, which may be provided by your bank or by a credit bureau. A good credit reporting service will be able to notify you if any adverse information is placed in your credit history and serves the dual functions of letting you know what people who access your credit history are seeing and giving you quick notice if you have been the victim of fraud.

Data Backup

- Data backup is not necessarily a pure privacy issue, but it is a necessity for today's technology users. There are two methods of data backup available today: local storage (on devices like external hard drives or recordable media like CDs or DVDs) and cloud-based storage.

- Locally stored backup can be thwarted by the theft or destruction of the means of storage. Cloud-based storage, on the other hand, requires you to disclose your information to the storage provider and potentially other entities, subject to the terms of the user agreement. A cloud-based provider could also disclose your information to the government subject to certain warrants, subpoenas, or reporting requirements whereas your Fifth Amendment right against self-incrimination might protect against such disclosure.

- Furthermore, if you are relying on cloud-based backup you are then trusting the storage provider to keep your data secure and private. If you do choose to use cloud-based backup, you should closely read the terms and conditions of your agreement with the storage provider, use an encrypted connection to transfer files between your machine and the cloud, and encrypt any sensitive files before uploading them.

Suggested Reading

Boyle, *Shamans, Software, and Spleens*.

Honan, "How Apple and Amazon Security Flaws Led to My Epic Hacking."

Rosen, "Roberts v. the Future."

Questions to Consider

1. Discuss the three futuristic scenarios in the final lecture: cognitive profiling that would attempt to predict people's predisposition to violence based on brain scans; efforts to clone human beings and design babies based on features like eye color, sexual orientation, and

intelligence; and efforts to patent human life, including genetically enhanced dolphins with human IQs. Which of these scenarios do you find most disturbing? Would you support efforts to regulate or ban each of these scenarios? Do you think they raise constitutional issues?

2. Out of all the examples of cutting-edge battles over privacy, property, and free speech in this course, which most surprised you—and why? What was the most practical lesson you learned? In what ways do you plan to change your behavior to protect your own privacy in the future?

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